

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [REDACTED] 1921

No. [REDACTED] 90

JOHN GOOCH, JR., PETITIONER,

vs.

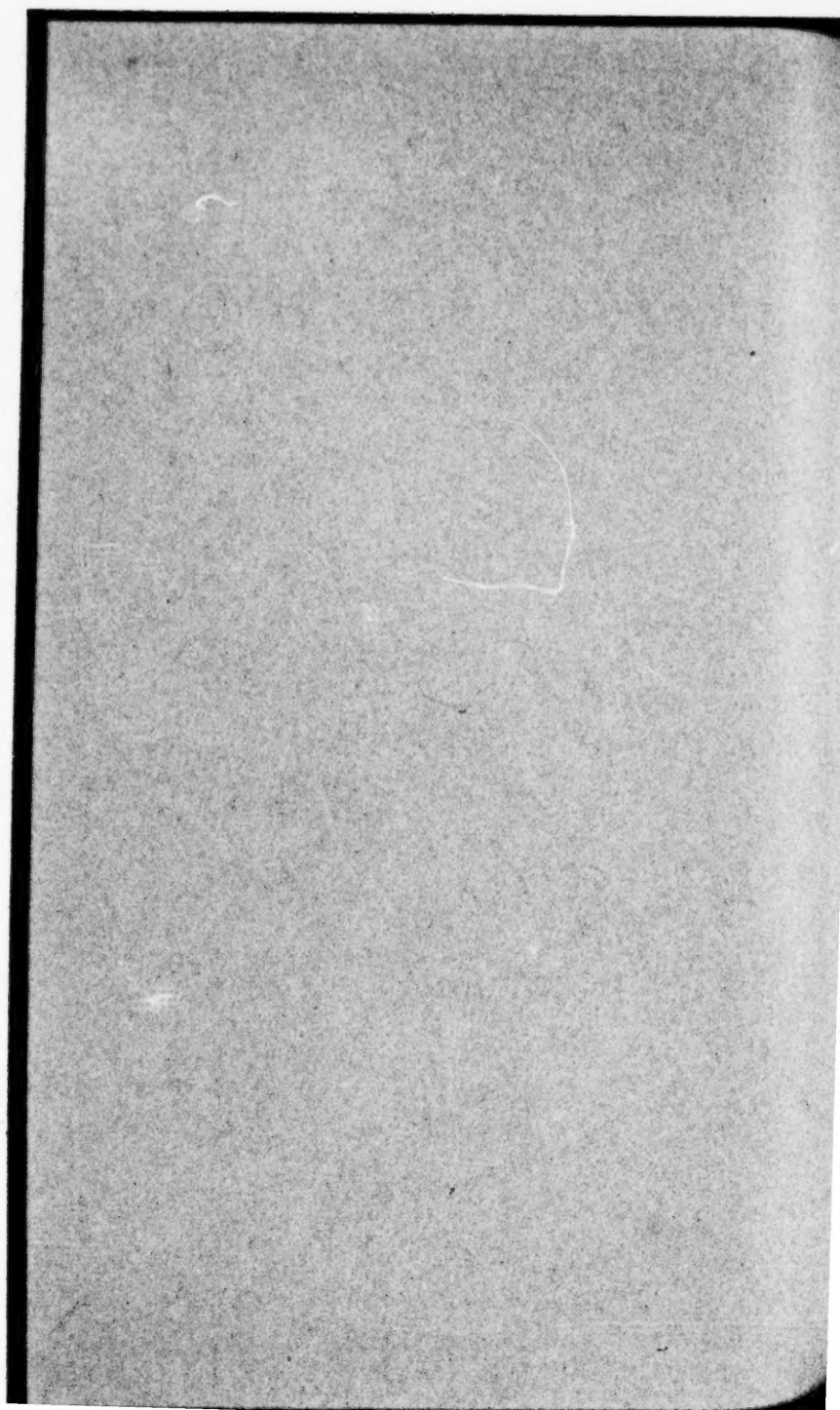
OREGON SHORT LINE RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR CERTIORARI FILED JUNE 18, 1920.

CERTIORARI AND RETURN FILED OCTOBER 23, 1920.

(27,769)



(27,769)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 412.

JOHN GOOCH, JR., PETITIONER,

vs.

OREGON SHORT LINE RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT.

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1-6 *Names and Addresses of Attorneys of Record.*

J. H. Peterson, Esq.,
T. C. Coffin, Esq.,
 Pocatello, Idaho,
 Attorneys for Plaintiff in Error.
George H. Smith, Esq.,
 Salt Lake City, Utah.
H. B. Thompson, Esq.,
John O. Moran, Esq.,
 Pocatello, Idaho,
 Attorneys for Defendant in Error.

7 In the District Court of the Fifth Judicial District of the
 State of Idaho in and for Bannock County.

No. 210.

JOHN GOOCH, JR., Plaintiff,

vs.

OREGON SHORT LINE RAILROAD COMPANY, a Corporation, Defendant.

Complaint.

Plaintiff, for a cause of action against the defendant, complains and alleges:

I.

That the defendant, Oregon Short Line Railroad company, is now, and during all the times herein mentioned has been, a corporation organized and existing under and by virtue of the laws of the State of Utah and during all of said time has been and now is doing business in the State of Idaho.

II.

That the said defendant during all the times herein mentioned has owned, controlled and operated, as an interstate common carrier of passengers, freight, merchandise, live stock and other personal property, a line of steam railroad between the station of Bancroft, in the State of Idaho, and the station of Granger, in the State of Wyoming, as well as between other points in the states of Idaho and Wyoming; that the said line of railroad between the station of Bancroft
8 in the State of Idaho and Granger in the State of Wyoming during all of said time passed through the station of Donovan in the State of Wyoming over which said line of railroad the said defendant operated and still operates its steam locomotives and trains of cars.

III.

That the plaintiff, during all the times hereinafter mentioned, has been a married man, forty years of age, the father of six children whose ages range from two to fifteen years, and that plaintiff, during all the time herein mentioned has been engaged in the farming and live stock business and prior to the 24th day of November, 1917, was a strong, robust and healthy man and was capable of doing any and all work connected with his said farming and livestock business, and in the carrying out of such work, plaintiff led an active outdoor life and in caring for the livestock owned by him, it was necessary for him to ride on horseback over the public range on which his livestock roamed and fed.

IV.

That on the 23rd day of November, 1917, the said defendant, Oregon Short Line Railroad Company, in consideration of the care and attention to be given by plaintiff to certain livestock, the property of plaintiff, then loaded and shipped from the said station of Baneroft in the State of Idaho over the line of railroad of the said defendant, Oregon Short Line Railroad Company and over the
9 line of railroad of the Union Pacific Railroad Company, the connecting carrier of the said defendant, to the station of Omaha, in the State of Nebraska, promised and agreed, as such common carrier, to carry, convey and transport plaintiff, on the train carrying such livestock from the said station of Baneroft in the State of Idaho to the station of Omaha, in the State of Nebraska.

V.

That while the plaintiff was a passenger on such train and on the 24th day of November, 1917, at the hour of about six o'clock A. M. of said day at or near the said station of Donovan in the State of Wyoming, through which said point the said train carrying and conveying said live stock passed, and while the plaintiff was sleeping in the caboose attached to said train, the said defendant negligently, carelessly, unlawfully and without due or any regard for the safety of plaintiff, caused and permitted the steam locomotive used to draw said train to violently strike and collide, while running at an excessive rate of speed, with said caboose in which said plaintiff was sleeping as aforesaid.

VI.

That as a result of said collision the said caboose was entirely and totally wrecked and shattered and plaintiff was thrown with great force and violence to the ground and was buried under and firmly held by the wreckage and debris caused by said collision; that the
10 said wreckage and debris caught fire and by reason of the weight of the said wreckage and debris so thrown upon him was unable, though entirely conscious, to notify persons of

his perilous position; that the plaintiff suffered a broken right collar bone, a bolt was driven through his groin, his head, face and eyes were cut and lacerated, his right hand was torn and bruised, both hips were bruised, shattered and crushed, and his left leg and left shin were cut, bruised and *and* crushed and his heart was severely and permanently injured.

VII.

That at the time of said collision at the said station of Donovan, the weather was extremely cold and severe; that after plaintiff had been removed from the wreckage and debris under which he was caught and held as aforesaid, he was placed, without sufficient covering, on the ground by the agents of said defendant, where he remained for a period of more than three hours and plaintiff was then by the agents and servants of said defendant, placed in an unheated and cold baggage car and was carried a distance of about forty miles to a hospital and during all of the time plaintiff lay on the ground as aforesaid and while he was in said baggage car as aforesaid, he lost large quantities of blood and endured, by reason of his said wounds, the loss of blood and the cold, great pain and suffering.

VIII.

11 Plaintiff further alleges that since the said injury he has been unable to do or perform his usual work as a farmer and is informed and believes and therefore alleges the fact to be that he will, as a result of said injuries, continue to be unable to do or perform such work or labor.

IX.

Plaintiff further alleges that as a result of said injuries the plaintiff was made sick and sore and was for a period of four weeks confined in a hospital and during all of the time since said injuries were received the plaintiff suffered and still suffers and will continue to suffer tormenting pains and great mental and physical anguish. That the said wounds so wrongfully, negligently, recklessly and unlawfully inflicted upon plaintiff by the defendant as aforesaid, are permanent and the injuries which plaintiff suffered as a result thereof are permanent and have and will permanently disable plaintiff and prevent the plaintiff from attending to and performing his usual business. That the nervous shock sustained by plaintiff was severe and extreme and plaintiff now suffers and **will continue to** suffer therefrom; that plaintiff's heart has been permanently and seriously injured and affected. That by reason of the wounds inflicted upon plaintiff by the said defendant as aforesaid, plaintiff's countenance has been greatly changed and rendered haggard and his features disfigured and his memory and sight permanently impaired and affected and plaintiff now suffers and will continue to suffer permanently such disfigurement and impairment and his memory will continue to suffer during all of his life

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great mental and physical pain and anguish and now suffers and will continue to suffer during all the days of his life from the severe and violent nervous shock which he then sustained and received.

X.

That by reason of the matters and things hereinbefore alleged, the plaintiff has been damaged in the sum of Twenty Thousand Dollars (\$20,000.00).

Wherefore, plaintiff demands judgment against the said defendant for the sum of Twenty Thousand Dollars (\$20,000.00); for costs of suit and for such other and further relief as may be just and equitable.

PETERSON & BAKER,
Attorneys for Plaintiff.

Residence, Pocatello, Idaho.

STATE OF IDAHO.

County of Bannock, ss:

John Gooch, Jr., being first duly sworn, deposes and says: That he is the plaintiff in the above entitled action; that he has read the foregoing complaint, knows the contents thereof, and that he believes the facts stated therein to be true.

JOHN GOOCH, Jr.

13 Subscribed and sworn to before me this 19th day of March,

1918

[SEAL]

HENRY VAN SLOOTEN,
Notary Public, Residing at Bancroft, Idaho.

Endorsed: Filed April 23, 1918. W. D. McReynolds, Clerk.
Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

No. 210.

Answer.

Comes now the defendant and for answer to the complaint filed herein, admits, denies and alleges as follows:

I.

Admits the allegations contained in Paragraph- I, II, and IV of said complaint.

II.

Answering Paragraph III of said complaint, defendant admits that at the date of the matters therein complained of, plaintiff was

40 years of age, and was at said time, and has ever since been engaged in farming and livestock business, but defendant had not knowledge or information sufficient to form a belief as to whether or not, prior to said time, plaintiff was strong, robust or healthy, or capable of doing any and all, or any or all, work connected with his said farm and live stock business, or in carrying out such work,

14 and upon that ground denies each and every of said allegations. Defendant has not knowledge or information sufficient to form a belief whether at any of said times plaintiff was a married man or possessed of any family, and on that ground denies each of said allegations.

III.

Answering Paragraph V of said complaint, defendant admits that while plaintiff was a drover passenger on a freight train of this defendant on the 24th day of November, 1917, at about six o'clock on the morning of said day, at Donovan Siding in the State of Wyoming, the plaintiff was in a caboose attached to said train and that an engine or locomotive operated on the line of railroad of this defendant at said point collided with said caboose, but denies that the defendant either negligently, carelessly, unlawfully, or without due or any regard for the safety of the plaintiff, caused or permitted said steam locomotive to collide with said train or that said steam locomotive was running at an excessive rate of speed, or that the defendant was guilty of any negligence as alleged in said Paragraph V of said complaint.

IV.

Answering Paragraph VI of said complaint, defendant admits that as a result of said collision the rear end of said caboose was totally wrecked and that said caboose caught fire and was wholly destroyed, and that the plaintiff was removed from the wreckage of said caboose, and defendant admits that plaintiff sustained a
15 broken collar bone and an abrasion of the right side of the face and that his left hip was bruised, but denies that plaintiff was pinned under said wreckage conscious and unable to notify persons of his perilous position, or that a bolt was driven through his groin, or that his head or either of his eyes were cut or lacerated, or that his right hand was torn or bruised, or that his right hip was bruised, or that either of his hips were shattered or crushed, or his left leg and shin bruised or crushed, and denies that defendant's heart was injured severely, permanently, or at all, and denies each and every other allegation contained in Paragraph VI of said complaint.

V.

Answering Paragraph VII of said complaint, defendant denies that at the time of said collision the weather was extremely cold or severe, or that plaintiff was placed without sufficient covering on the ground by the agents of this defendant or others: denies that plain-

tiff remained for three hours, or any considerable period, upon the ground; admits that plaintiff was placed by the defendant's agents and servants in a baggage car and carried a distance of about 40 miles to a hospital, but denies that during all or any of said time said baggage car was unheated or that the plaintiff lay on the ground without sufficient covering or that plaintiff lost large quantities of blood or suffered from cold.

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VI.

Answering Paragraph VIII of said complaint, defendant denies that since said injuries, plaintiff has been unable to do or perform his usual work as a farmer, and denies the fact to be that plaintiff will, as a result of any injuries sustained by him in said collision, continue to be unable to do or perform such work or labor.

VII.

Answering Paragraph IX of said complaint, defendant admits that following said injuries, the plaintiff was confined in a hospital for a period of approximately four weeks and that plaintiff suffered some pain, but denies that plaintiff suffered tormenting pains or great mental or physical anguish, and denies that the wounds referred to in Paragraph IX of said complaint were inflicted wrongfully, negligently, recklessly or unlawfully or that any thereof are permanent, or that the plaintiff suffered permanent injury in consequence thereof, or will be permanently disabled or prevented from attending to or performing his usual business, and denies that plaintiff's health was or is permanently impaired. Denies that plaintiff suffered a severe or extreme nervous shock or that plaintiff now suffers or will continue to suffer therefrom; denies that plaintiff's heart was injured or affected permanently, seriously, or at all, or that plaintiff's countenance has been greatly changed or rendered haggard, or his

17 features disfigured or his memory or sight impaired or affected permanently or at all; and denies that plaintiff now suffers or will continue to suffer permanent or other disfigurement or impairment of memory or mental or physical pain or anguish, either as the result of a violent or other nervous shock or any matter or thing alleged in said complaint.

VIII.

Defendant denies that by reason of any of the matters or things alleged in said complaint, plaintiff has been damaged in the sum of \$20,000.00, or any other amount.

IX.

Further answering said complaint and as a second separate and additional defense thereto, defendant alleges that for more than thirty days prior to the 23rd day of November, 1917, the defendant had filed with the Interstate Commerce Commission, at Wash-

ington, D. C., its tariffs providing for the transportation of live stock and care takers in charge of the same, and posted said tariffs as required by law. That by said tariffs it was provided that concerning the transportation of attendants in charge of livestock, that in consideration of the carriage without charge other than the sum stipulated in said tariffs and shipping contracts for the carriage of livestock transported thereby, the carrier should not be liable for any accident or injury to such person caused by negligence on either the going or return trip, or while on or around the railroad tracks or premises, unless such livestock owner or attendants, or his heirs or personal representatives, should, within thirty days after the accident or injury, give notice in writing of his claim therefor to the General Manager of the carrier on whose line such injury should occur, and that unless such notice should be given, no claim for such injury should be valid or enforceable.

That at the time said livestock was delivered to the carrier for transportation at point of origin, and before the beginning of said transit, the plaintiff signed and entered into a written stipulation with the defendant in manner and form as provided in said tariffs as aforesaid, in words and figures as follows, to-wit:

"In consideration of his carriage without charge other than the sum stipulated herein for the carriage of the livestock mentioned herein, as a care taker accompanying said live stock, the undersigned hereby agrees * * *

"That the carrier shall not be liable for any accident or injury to him caused by negligence on either the going or return trip or while on or around the railroad tracks or premises, unless the undersigned, or his heirs or personal representatives shall, within 30 days after the accident or injury, give notice in writing of his claim therefor to the General Manager of the carrier on whose line it occurred, and unless such notice is given, no claim for personal injury * * * shall be valid or enforceable."

That the plaintiff did not give notice in writing to the General Manager of this defendant company or his or any claim for any injuries described in said complaint or any other injuries within thirty days after the said 23d or 24th day of November, 1917, and that said claim was, and is, pursuant to the provisions of said tariffs and aforesaid stipulation and agreement of the parties, waived.

Wherefore, defendant, having fully answered herein, prays to be hence dismissed with its just costs and disbursements herein incurred.

GEO. H. SMITH,
H. B. THOMPSON,
Attorneys for Defendant.

Residence and Postoffice address of H. B. Thompson: Pocatello, Idaho.

STATE OF IDAHO,

County of Bannock, ss:

F. H. Knickerbocker, being first duly sworn, deposes and says: That he is an officer, to-wit, General Superintendent, of Oregon Short Line Railroad Company, a corporation, defendant herein, and makes this verification for and on behalf of said corporation; that he has read the foregoing answer and knows the contents thereof, and affiant believes the facts therein stated to be true.

F. H. KNICKERBOCKER.

Subscribed and sworn to before me this 12th day of April, 1918.

[SEAL.]

W. W. WOOLARD,
Notary Public for Idaho,
Residing at Pocatello, Idaho.

20 Service of a copy of the foregoing answer acknowledged
this 12th day of April, 1918.

PETERSON & BAKER,
Attorneys for Plaintiff.

Endorsed: Filed April 23, 1918. W. D. McReynolds, Clerk.
Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

No. 210.

Judgment.

This cause came on regularly for trial on the 11th day of March, 1919, Jos. H. Peterson, Esq., appearing as counsel for the plaintiff, and H. B. Thompson, Esq., appearing for the defendant. A jury of twelve persons was regularly impaneled and sworn to try said action. Whereupon witnesses on behalf of the plaintiff were duly sworn and examined and the plaintiff's evidence being closed, and plaintiff's counsel having announced that he rested his case, defendant's counsel moved for an order of non-suit and a dismissal of said action upon the ground that upon all the evidence adduced on behalf of the plaintiff he is not entitled to recover, and said motion being duly argued and submitted by counsel for the respective parties.

Now, therefore, it is ordered that said motion be and the same hereby is granted and allowed, and it is

Ordered and Adjudged that the plaintiff take nothing by his said
complaint and that judgment be entered dismissing said
21 complaint and that the defendant have and recover from the
plaintiff its just costs and disbursements incurred herein
amounting to the sum of \$149.45.

Dated this 14th day of March, 1919.

FRANK S. DIETRICH,
Judge.

Endorsed: Filed March 14th, 1919. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 210.

Notice of Motion.

To the above-named defendant and to his attorneys, Geo. H. Smith
and H. B. Thompson:

You and each of you will please take notice that the plaintiff
herein, at 10 o'clock A. M., or as soon thereafter as counsel can be
heard, on the 20th day of March, 1919, in the court room of the
above-entitled Court, in Pocatello, Idaho, will move the above-en-
titled Court for a New Trial in said Cause, upon the ground of
error in law occurring at said trial, and that said motion will be
made upon all pleadings and papers on file in said cause and upon
the Minutes of the Court.

A copy of said Motion is attached to this Notice and by reference
made a part hereof.

Dated at Pocatello, Idaho, this 17th day of March, 1919.

J. H. PETERSON,
Attorney for Plaintiff.

22 Service of the foregoing Notice and receipt of a copy
thereof admitted this 17th day of March, 1919. Defendant
hereby consents that said Motion may be heard in accordance with
this Notice, hereby waiving any other or further notice.

H. B. THOMPSON,
Attorney for Defendant.

Endorsed: Filed March 17, 1919. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 210.

Motion for New Trial.

Now comes the plaintiff, by his attorney, J. H. Peterson, and moves the Court to set aside and vacate the judgment entered herein on the 14th day of March, 1919, and grant a new trial therein for the reason that:

The Court committed error in law at the trial in allowing defendant's motion for a non-suit at the close of plaintiff's case.

This motion will be made upon all the pleadings and papers on file in said cause and upon the Minutes of the Court.

J. H. PETERSON,
Attorney for Plaintiff.

Endorsed: Filed March 20, 1919. W. D. McReynolds, Clerk.

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(Title of Court and Cause.)

No. 210.

Memorandum Decision Upon the Petition for a New Trial.

BIETRICH, D. J.:

The suit was brought by plaintiff to recover for personal injuries suffered by him in a collision between two of the defendant's freight trains. In one of the trains he had a car of cattle and as caretaker he was riding in the caboose upon a drover's pass. To secure such pass he was required to and did execute a written stipulation, the material parts of which are as follows:

"Release of Man or Men in Charge.

In consideration of his carriage without charge other than the sum stipulated herein for the carriage of the live stock mentioned herein, as a caretaker accompanying said live stock, the undersigned hereby agrees * * *. 2. That the carrier shall not be liable for any accident or injury to him caused by negligence on either the going or return trip, or while on or around the railroad tracks or premises unless the undersigned, or his heirs or personal representatives, shall within thirty days after the accident or injury give notice in writing of his or their claim therefor to the general manager of the carrier on whose lines it occurred, and unless such notice is given no claim for personal injury, death or loss of baggage shall be valid or enforceable."

This stipulation was demanded by the defendant of all care takers in compliance with a regulation constituting a part of its tariff schedules, adopted, filed, and published pursuant to the requirements of the Interstate Commerce Law. It being admitted at the trial that no written notice of the plaintiff's claim was given within thirty days after the accident, a non-suit was granted. Contending that the dismissal was erroneous, plaintiff now seeks a new trial.

While the several discussions which have been had have taken a wide range, the real controversy as now defined by the written briefs appears to be of narrow compass. It is agreed that plaintiff, though riding upon a drover's pass, had the status of a passenger for hire, and further, that Section Twenty of the Interstate Commerce Act, with its amendments, is inapplicable to the case. A stipulation such as that under consideration is not expressly authorized or forbidden by the Act, but in considering its validity and effect, general provisions against discrimination, and especially Section Six, requiring the filing and publication of tariffs and regulations relating thereto, may be regarded as pertinent. As was said in *K. C. S. Ry. Co. vs. Alberts Con. Co.*, 223 U. S. 573, 596: "The chief purpose of the act was to secure uniformity of treatment to all, to suppress unjust discriminations and undue preferences, and to prevent special and secret agreements in respect of rates for interstate transportation, and to that end to require that such rates be established in a manner calculated to give them publicity, to make them inflexible while in force, and to cause them to be unalterable save in the mode prescribed." Manifestly, if this essential purpose of law is to be effected, schedules of rates with attendant privileges and limitations to and upon shippers must be held to be binding upon both the carrier and the shipper and may not be waived or ignored by either party. It follows that plaintiff is bound by the defendant's published regulation under which the stipulation was required, unless for some reason such regulation is void. To be void it must either contravene a positive statute or be repugnant to some principle of public policy. No conflicting statute, either national or state, has been called to my attention and the position that such a requirement is against public policy, is thought to be without support, either in reason or authority. All the cases cited by the plaintiff involve stipulations exempting the carrier from liability or substantially limiting such liability; but the stipulation under consideration does not purport to provide such an exemption or limitation. Upon compliance with a very simple condition, deemed to be reasonable and in furtherance of sound public policy, the plaintiff could have demanded full compensation for his injury. The reasons for requiring prompt notice of claims for injury to person or property have been too often considered and recognized to require present discussion.

To recapitulate, the stipulation was a material part of the contract of carriage. It was in harmony with tariffs and regulations filed and published as provided by the Interstate Commerce Act.

26 The requirement that notice of claim be given in thirty days is not unreasonable, violates no statute and contravenes no principle of public policy. Accordingly, the stipulation was valid and the plaintiff having failed to comply with it is barred from recovering.

These conclusions are thought to be supported by the following as well as other cases: B. & M. R. Co. vs. Hooker, 233 U. S. 97; Erie R. R. Co. vs. Stone, 244 U. S. 332; Georgia F. & A. R. Co. vs. Blish M. Co., 241 U. S. 190; Henry vs. Chicago, Mil. & St. Paul R. Co., 147 Pac. 425; Kalina & Czek Pac. R. Co., 76 Pac. 438; St. Louis I. M. & S. Co. vs. Starbird, 243 U. S. 592; Sou. Pac. R. Co. vs. Stewart (decided by U. S. Supreme Court, January 13, 1919.)

True, most of the cases involve stipulations for notice of claims on account of injury to property; but if, where there is no statutory prohibition, the validity of such a stipulation is to be sustained, no reason is apparent for taking a different view of like stipulations relating to personal injury.

Let an order be entered denying the petition for a new trial.

April 12, 1919.

FRANK S. DIETRICH,

District Judge.

Endorsed: Filed April 15, 1919. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 210.

Bill of Exceptions.

Be it remembered that the trial of the above-entitled cause came on the 11th day of March, 1919, at a stated term of the
27 above-entitled Court begun and holding in Pocatello, Idaho, in said District, the Honorable F. S. Dietrich, District Judge, presiding, and the plaintiff being represented J. H. Peterson, Esq., and the defendant by H. B. Thompson and Geo. H. Smith, esquires, and a jury having been duly impaneled, the following proceedings were had, to-wit:

ED. F. KELLEY, being on the witness stand, duly sworn as a witness for the plaintiff, testified that he is a farmer and stock raiser living about eight miles northwest of Bancroft, Idaho. In November, 1917, he shipped a few head of stock east in the shipment of Mr. Whitworth. The cattle were loaded at Dolbeer spur, about a mile north of Pebble, Idaho. Mr. Whitworth and the witness boarded the train at Dolbeer spur and when they reached Bancroft were joined by Mr. John Gooch, the plaintiff, Mr. Rob Howell, Mr. A. Ashton, Raymond Toolson and Asa Hatch, who proceeded easterly with them on the train. With the exception of Toolson and Ashton all these gentlemen had sheep or cattle on the train.

On the morning of the 24th of November, 1917, the witness was asleep in the caboose of the train near Donovan, Wyoming. The witness was asleep on top of the cupboard under the brakeman's seat in the cupola, using his heavy mackinaw coat for a pillow, when he was awakened by a crash. Upon opening his eyes he saw a large light shining over him and he was himself sliding down between the broken timbers of the caboose. He slid a short distance and then became fastened. After a little time the engine backed out and released the timbers holding him so that they spread apart and he extricated himself and walked out. The end of the engine head was shattered into splinters and driven up in a heap; the hind trucks of the caboose were piled on top of the front trucks and a part of the walls of the caboose remained standing against the first cattle car. As he was getting out of the wreckage he noticed young Defenbach, a young man who had joined the train at Montpelier with a shipment of apples, wedged in between the fallen timber and the wall of the caboose which was still standing. As he got to the edge of the wreckage the brakeman called his attention to one dead man and said "I guess they are all killed." Immediately the wreckage caught fire. The witness rushed first to the assistance of Whitworth, and upon asking him if he was hurt, Whitworth replied, "Yes, I am hurt, but get the other boys; Mr. Gooch was in where I was." Kelly tried first to get the boy Defenbach out, but Mr. Howell and the brakeman took him out. The witness then ran to the opposite part of the wreckage and saw that Mr. Howell had Gooch in his care down off the grade. By this time all the men were out of the wreckage and it was all afire. The witness and Mr. Roberts then broke the seal on the first sheep car and threw some of the sheep out to prevent their being burned. Then the witness went to the assistance of Mr. Gooch, the plaintiff. He raised Gooch up and with his head resting on his knee tried to relieve him. Gooch's face was black and his right eye was closed entirely. The face was not swollen at that time, the right eye only being swelled shut. His hand was scored up and bleeding. Gooch indicated that he was suffering a great deal. The witness remained, holding Gooch's head on his knee for about a half or three-quarters of an hour and then, a fire having been built down the grade, Gooch was moved to the fire.

The collision had occurred about six o'clock in the morning and they stayed by the bonfire until about eight o'clock. The weather was very cold. Mr. Gooch had on nothing but a common coat. After staying by the fire until eight o'clock a train consisting of a caboose came along, and a doctor and a lady arrived. Shortly thereafter a passenger train came along and Gooch was placed on a stretcher and carried to the baggage car. Gooch was very cold during the long wait, the witness himself being very cold and he being dressed as warmly as was Gooch, but Gooch, all this time, was lying on the cold ground.

The witness next saw Gooch in the hospital at Kemmerer. Gooch was lying on the floor in the hall and the attendants had started

taking his boots off. Gooch was in a great deal of agony and misery and the witness told the attendants to cut his boots off.

Gooch was then placed in a bed in a room in the hospital.
30 His face was then badly swollen and discolored and one eye was swollen completely shut. Gooch asked Kelley to get his money and watch out of his clothes, which Kelley did. The witness also found a tin can in one of the trousers' pockets, the right hip pocket, which can was admitted in evidence as Plaintiff's Exhibit No. 1, and which has been certified to this Court. The witness saw Gooch again at three o'clock that day in his room in the hospital. At that time Gooch's face had not been washed.

The next time the witness saw Gooch was in December, just prior to Christmas and at that time Gooch's face was still discolored and he walked with a limp.

Upon cross-examination the witness testified that when the wreck occurred the only facilities they had for wrapping people up were one cushion out of the caboose, a piece of a quilt and three mackinaw coats. The wreck occurred about six o'clock in the morning. The engine and caboose came from the east just a few minutes before the passenger train No. 5, which also came from the east, arrived. The tobacco can, watch and money were taken from Mr. Gooch's clothes by the witness at the request of Mr. Gooch. The people who went to the hospital that morning were Mr. Whitworth, Mr. Gooch, Mr. Ashton and Mr. Howell. When the witness left the hospital at three o'clock in the afternoon he did not know whether Mr. Gooch's wounds had been dressed or not but he did know that his face had not been washed.

31 Robert Howell, a witness called by the plaintiff, testified in substance on direct examination that he was a farmer and stock raiser living at Bancroft, Idaho. He was with John Gooch, Ed Kelley, Mike Whitworth and Mr. Ashton in a freight train going east with cattle, and on the morning of November 24th, 1917, was near Donovan, Wyoming. An engine, coming from the west, struck the rear end of the caboose in which the witness was at the time, "everything came together with a crash," the witness "went up in the air," through the top of the car, then fell back into the wreckage, and walked out onto the track. The witness turned around, saw a man in the wreckage which was burning, the man himself being on fire, and, with the help of the brakeman, kicked the boards off and pulled the man out. The witness heard someone call "Oh Bob" and he ran around the car and saw Mr. Gooch pinned in the wreckage. The wreckage was piled in a heap up against the first stock car. The man who had called "Oh Bob" was Gooch, the plaintiff. The witness found him lying on his side pinned in the wreckage, and while unable to pull him out alone he finally, with the help of the others, pulled him free. They stood him upon his feet, but he toppled over and the witness caught him before he fell. His right arm and hips were pinned down in the wreckage, and in pulling him loose his hand was scratched up. The fire was right up against
32 him when he was pulled out. Gooch was carried down the grade and laid on the ground while the witness went back to see if he could help anyone else out. When the witness went

back Ed. Kelley was supporting Gooch on his knee and Gooch appeared to be in great pain, he was bruised up badly. His face was covered with blood and bluish in color and his right eye was swollen shut. It was very cold. About an hour and a half elapsed before the train arrived into which Gooch was loaded and taken to Kemmerer. Gooch was loaded into the baggage car which had no stove in it and which was cold. The baggage car contained baggage and a dead man beside Mr. Gooch and the witness. The only provision made to keep Gooch warm on the trip in the baggage car was a blanket or quilt thrown over his legs. When Gooch was able to speak he spoke to the witness and told him that he was cold and that he was in pain. The witness did not see Gooch after they reached Kemmerer.

Upon cross-examination the witness testified that it was about an hour and a half after the collision before the train which carried Gooch to Kemmerer arrived. The stretcher upon which Gooch was carried had canvas on it. The witness was not cold himself in the baggage car, which he supposed was steam heated, but Gooch was. The witness said nothing to the train men about Gooch's being cold because there was one standing right alongside who could tell without being told, and the witness not seeing any blankets or covering of any kind did not ask the trainmen for any to cover Gooch. The witness saw Gooch again that day just before he left for Green River. Gooch was in the hospital and appeared to be "pretty good."

R. L. Taylor, a witness called by the plaintiff testified on direct examination that plaintiff's exhibit 1 was a can which was given to him by Ed. Kelley in Kemmerer on the day of the accident, the witness having accompanied Mrs. Gooch to the hospital to see her husband. The witness stated that he kept the can in his possession until he gave it to Mr. Gooch, and that when shown him in the court room, it was in the same condition as when he first received it at Kemmerer.

Leo Ashton, a witness called on behalf of the plaintiff testified that he lived at Bancroft, Idaho. On the morning of November 24th, 1917, he was in a caboose at Donovan, Wyoming, with Ed Kelley, Bob Howell, Jack Gooch, Raymond Toolson and Asa Hatch. The caboose was on the rear of a train of about forty-nine cars, the train being headed east. About six o'clock in the morning an engine "hit the caboose and put the hind trucks up on top of the front trucks, and heaped the caboose right against the cattle car." The witness was buried under the timbers of the caboose, found an opening and struggled out and down the embankment. As he was coming back up he heard Gooch call "Oh Bob," and then he met Mr. Howell coming around the end of the car and together they proceeded to Mr. Gooch. They found him lying on his right side with his right hand and right arm pinned in the wreckage, and his hips also pinned in. They got him out just as the fire was within about three feet of him. They asked him if he could stand and he said, "Yes, get the other fellows." They left him, but he started to fall so they took him down the embank-

ment and laid him on the grass. Then Mr. Kelley held him on his knee for about an hour and three-quarters when he was laid on a cushion which came out of the caboose. When Gooch was in the wreckage he was lying on his right side, his face was black and blue, one eye was swollen shut and the other almost shut. About ten minutes elapsed between the collision and the time the witness extricated Gooch from the wreckage and about two hours more before the train on which he was carried to Kemmerer arrived.

When the train arrived Gooch was placed on a stretcher and carried to the baggage car. The witness went to the baggage car with Gooch but only remained there about fifteen minutes as he had no coat and it was so cold he could not stand it. The witness went back in one of the other cars with the other fellows and did not see Gooch again until he was placed in the automobile truck and taken to the hospital at Kemmerer.

Upon cross-examination the witness testified that after the collision he first extricated himself, then went up the embankment to see what he could do about helping the other fellows. They tore the hide off Gooch's hand in getting him out of the wreckage. He

35 didn't do anything in the baggage car to provide warmth for Gooch, he wasn't in there long and "I was almost unable to then, I only had three ribs broken." He saw Gooch in the hospital about three o'clock that day and Gooch talked rationally enough then.

Michael Whitworth, a witness called on behalf of the plaintiff testified that he was a farmer and stock raiser living near Baneroff, Idaho. On the morning of November 24th, 1917, the witness was in a caboose near Donovan, Wyoming, sleeping on the side of a table on the floor of the caboose, Gooch being on the other side. On being asked what happened there that morning the witness replied, "Our engine ran into us there, into the rear end of the caboose." He was then asked to state in his own language just what happened, and he said: "It run into us there and I—I wasn't asleep; I was just kind of dozing off, and I had been asleep, and was kind of half asleep and half awake when it hit us and the shock kind of woke me up, and it seemed like I was rolling around there a few minutes before I realized what happened, and after I realized I kind of crawled out over the wreckage, and Mr. Kelley came to me there,— I hollered for him,—he was the first one I thought of, and I called him, and he seemed to be pretty near where I was, and he came to me, and I told him Mr. Gooch was in where I was, and to see if he could find him, and so he left me, and I kind of rolled off down the grade away from the fire, where the other boys was, and I guess

36 it was probably fifteen minutes before I got back where I saw Mr. Gooch again; after they got all the boys out and the wreckage was practically cleaned away, I kind of walked back where the other boys was, and I saw Mr. Gooch there. They laid him out on a cushion there, partly covered up when I saw him. The first time I saw him his face was discolored and his eyes blue." The caboose was demolished and on fire. The witness went to the hospital with Mr. Gooch, and was there for two nights. When he

saw Gooch in the hospital Gooch was suffering a great deal of pain. The witness did not see Mr. Rasmussen at the hospital. He was not sure where he saw Mr. Rasmussen first after the wreck, it might have been Pocatello or Bancroft, but he thought it was on the train.

John Gooch, the plaintiff, called as a witness in his own behalf testified that he was born in Utah on November 1st, 1877. When about twelve years old he moved with his family to Preston, Idaho, where they were engaged in farming and where Gooch worked for his father on the farm. After about four years he again moved with his family to Gentile Valley, Idaho, and after about five years Gooch went east on a two years' sojourn. On his return from the east he went back with his father who was living near Bancroft. He had no other education than a common country school education, and had learned no profession or trade other than farming or stock raising. Gooch was married sixteen years ago last Christmas and has six children.

37 Upon his return from the east he took up a homestead near Bancroft, got married and started in for himself. After he proved up on his homestead, he, with his brother bought other land, and on November 24th, 1917, owned about eleven hundred acres and some cattle.

Gooch ran his own farm, hauled hay, plowed, put in grain, rode horseback, rode the range, gathered cattle, built fences and dug ditches and did all kinds of farm work, acting rather in the capacity of owner and foreman.

On the morning of November 23rd, 1917, Gooch rounded up some cattle and took them to the stockyards of the Oregon Short Line Railroad Company at Bancroft, Idaho, for shipment to the east. The only cars which the railroad company could furnish were double-deck sheep cars and the plaintiff, together with several other shippers worked for several hours tearing the decks out so as to make the cars available for his cattle. In addition to the plaintiff Mr. West, Mr. Beck, Hatch and Howell had cattle there for loading. After loading the cattle Mr. Gooch joined the train as caretaker for his cattle, riding himself in the caboose and proceeded easterly with them. There were about forty cars of stock in the train. Asked as to what happened on the morning of November 24th, 1917, the plaintiff replied, "Why, on the morning of the date spoken of we were—I was asleep in the caboose, and I were awakened by an awful crash that occurred at that time. Of course I didn't know what it was at the time. And I felt myself
38 being rolled over and over, and first one thing would hit me on one side and then something would hit me on the other, and finally it seemed as though I fell to the ground or onto something, and a great load settled right down on me. I don't know how heavy a weight it was, but it was so heavy that I could hardly breathe, and when I did breathe I would make a noise, and I don't know how long I laid there in that condition." He was lying on his face at the time with the weight upon his back. Asked as to where the weight was he said, "Practically all over me. My face

was squeeze so, and my back and legs, it seemed like the whole weight was right upon them." The weight was so great he could hardly breathe and though he tried to make a noise to attract the attention of the other boys he could not do so. The witness was asked what next occurred and replied,

"Why something released the wreckage. I learned afterwards that they backed the engine up, and the timber started to roll off from me, similar to the way they were rolled onto me. I don't know how, but they just loosened up and drag off of me, and when I come out where I could see again I opened my eye—the one eye I couldn't see—and the first thing I see was a man laying unconscious close to me, and I thought 'Well, I guess the boys are all killed.'" "I saw this man lying there unconscious, and I thought,

"Well, it's up to me to get out of here; I guess all the other boys are killed"; and I started to work the best I could. My one hand was

caught, and with the broken collar bone I had I couldn't

39 get it out from between these timbers, and I was working in that condition until I heard one of the other boys talking

on the other side. I recognized the voice as Mr. Howell, and I called to him."

"As soon as I called to Mr. Howell, it wasn't long before he came, and another fellow also, to my side, and they taken me

from the wreck. The fire was just getting to me then, it was beginning to get pretty hot at that place at that time; when they pulled

me loose I could feel the heat of the fire." "The boys carried me out and laid me upon the grass, and I was still kind of scared, and

I had the idea in my head that the engine was going to explode, and I tried then to crawl, after the boys left me,—I told them to

never mind me and go back and get the other boys,—and I tried to work myself away from the engine on the grass, by taking hold

of the grass with one hand and kind of dragging myself, but I didn't work far before I became exhausted and lay quiet."

At the time he was taken from the wreck he attempted to stand, "Yes, the boys had me standing up, they had hold of me and Bob said,

'Can you stand, Jack?' and I said, 'Yes, get the other boys out'. And he left loose of me, and I found I couldn't stand; when he

left loose of me I started to fall and he caught me." Asked how long a time elapsed between the crash and the extrication of him-

self by Howell and Ashton he replied, "It seemed like a long time, but I don't believe it was over ten minutes." The caboose was

broken to kindling wood and was on fire. For about two

40 hours the witness laid on a cushion on the ground, suffering great pain, in his right side, under his heart, in his hips,

his collar bone, one eye and his left leg, which was cut and bruised badly. After the two hours a train came and he was loaded into

the baggage car. A doctor was present but did not examine him at the time. He was placed on a stretcher and put in the baggage car

together with another injured man, the one that was killed, Mr. Howell and the doctor. The plaintiff was suffering a great deal of

pain and was very cold in the baggage car on the trip to Kennermer. Arrived at Kennermer he was loaded into a very rough riding truck

and suffered great pain while they were taking him to the hospital.

Arrived at the hospital Gooch was placed on the floor in the hall and the attendants started to undress him. The pain was so great, however, that the doctors gave him a hypodermic, and he went to sleep. When he woke up two hours later he was lying in bed surrounded by hot water bottles, but had been given no other attention. His face had not been washed, his collar bone, which was broken, had not been set, he had not been bathed. The next morning, however, his face was washed. His body was so sore the next morning that he could not move and he was in great pain. He was in the hospital for about a month. Thereupon the following proceedings were had:

Q. Do you know a Mr. Rasmussen?

A. I do.

41 Q. Did you meet him at the hospital?

A. Yes, sir.

Q. When did you meet Mr. Rasmussen?

Mr. Thompson: Just a moment. What is the purpose or relevancy of this?

Mr. Peterson: The answer, Your Honor, sets up that we failed to give notice to the railroad company within thirty days of the date of the accident. I propose to show by Mr. Gooch, if permitted, that within a very short time after the accident Mr. Rasmussen, the Claim Agent of the Oregon Short Line, was there, and consulted with him in reference to a settlement. This is solely for the purpose of showing notice to the Railroad Company, which I think has always been held—

Mr. Thompson: I submit that that is not in order at this time, and I submit that in any event the showing of notice to the railroad company that Mr. Gooch had sustained an injury, or any notice that he may claim under the circumstances, would not, either in anticipation of the defense or otherwise, excuse the failure of compliance with their contract to give written notice to the company within thirty days.

The Court: I can't anticipate just what the course of this testimony will be. It may be anticipatory; I am inclined to think it is. The objection perhaps should be sustained upon that ground, for the present time. Of course, that is without prejudice to your offering it later in rebuttal."

42 Continuing the witness testified that he was in the hospital for about thirty days though under the doctor's care for a longer period than that. Gooch was given a permit to go home for Christmas on his word that he would take care of himself. The doctor in whose care he was, Dr. Kendall, was in the employ of the Oregon Short Line Railroad Company. When Gooch left the hospital just before Christmas he was bandaged so that his arm was held against his body and adhesive tape around the whole so that the broken collar bone would properly mend, and he was told to return to the hospital within a week. The bandages remained upon him for a week when he returned to the hospital and they were re-

newed. No examination was ever made of him in the hospital until his collar was set, the day after he arrived, when he was caused to sit up in bed and the bone was then set. He had been in the hospital about ten days, when he received his first bath. A board was placed across the bath tub, on which Gooch sat, and bathed himself with one hand as best he could. He was finally discharged from the hospital about the 15th of January, 1918. Whereupon the following proceedings were had:

"Q. Now, I will ask you Mr. Gooch,—and this may be anticipatory too, your Honor,—if so, I shall reserve it for rebuttal,—I will ask you, Mr. Gooch, why it was that you did not give written notice to the Railroad Company within thirty days after this accident?

Mr. Thompson: I object to that as incompetent, irrelevant
43 and immaterial, and on the further ground that according to the tariffs which were the law which was binding upon both him and the carrier, and which could not be waived without a discrimination, he was bound to give written notice to the General Manager within thirty days, and he cannot be heard to state some reason why he did not do so, if he did not. It appears from the evidence that he was able to do so all the while. He says within ten days afterwards he bathed himself. He has been in perfect possession of all his faculties all of this time.

Mr. Peterson: That doesn't appear.

Mr. Thompson: It doesn't appear that it was competent for any employe of the railroad company to agree with him at any time to waive the tariffs or to waive his contract, if that is what he is driving at. The Supreme Court has spoken so positively and definitely on every subject that has arisen, which will form any guide to what the duty of the Court is in the premises, that I submit that the plaintiff can make no showing here which will excuse him here for his failure to serve a written notice upon the General Manager, in conformity to the tariffs and his contract, and that any attempt to do so is incompetent, and that his testimony upon the subject would be irrelevant and immaterial and incompetent, as well as being out of order.

The Court: Does your objection extend to the point that this would be proper rebuttal, if receivable at all?

44 Mr. Thompson: There can be no value in objecting to the order of proof, I think, at this time.

The Court: You don't object to the order?

Mr. Thompson: So I do not object to the order of proof. I submit it flat, as we have submitted it before.

The Court: Just so I understand the extent of your objection.

Mr. Thompson: Yes.

The Court: I think, gentlemen, I shall hear what the plaintiff has to offer upon this point—I can't anticipate just what he is going to say—and then determine whether or not he can make a sufficient showing to escape his default in giving the notice, whether that matter will be a question of law for me to determine or whether under

proper instructions it will be submitted to the jury. The objection will be overruled.

Mr. Thompson: We will save an exception.

The Court: Yes.

After an argument and ruling by the Court upon the form of a question asked the witness the following proceedings were had:

Q. During the time, Mr. Gooch, that you were in the hospital, during this four weeks, and over, were you confined to the hospital?

A. Yes, sir.

Q. What doctors did you see during that time?

A. Why I seen several doctors, but never learned the names of but two.

45 Q. See any doctors of your own choosing?

A. No, sir.

Q. You may state, Mr. Gooch, what the extent of your knowledge was at that time, and at the time of your discharge from the hospital, in respect to the extent of your injuries.

A. Well, I didn't know what the extent of my injuries were at that time.

Q. Did you know at that time anything in respect to whether the injuries were permanent or otherwise?

A. No, I didn't.

Q. You may state, Mr. Gooch, what your condition of mind was during the time that you were in the hospital.

A. The condition of my mind?

Q. Yes, sir, and your nerves?

A. I was very nervous. My memory was not very good at that time.

Q. Did you suffer any—what pain and anguish, if any,—

Mr. Thompson: Just a moment. I object to that as leading.

The Court: No, I think he may answer that.

Q. What pain and mental anguish and other suffering did you endure during this interval of four weeks when you were confined at the hospital?

A. Well, the first few weeks I suffered great pain, and after that not so much.

46 Q. Were you at any time wholly free from pain during the time you were in the hospital?

A. No, sir.

Q. Were you in a condition of mind, Mr. Gooch, during that interval of four weeks, of about four weeks, to transact business?

A. No, sir.

Mr. Thompson: Just a moment. I object to that as incompetent and calling for a conclusion of the witness.

The Court: Sustained.

Q. Did you transact any business during those four weeks?

Mr. Thompson: That is irrelevant and immaterial, and I object.
The Court: Sustained.

The witness continuing on direct examination stated that prior to the accident he had never had a serious sickness in his life. He was able to do a sixteen hour day's work and conduct his affairs as a rancher. He then weighed about one hundred and seventy pounds. Since the accident his health has not been very good and he weighs about one hundred and sixty. His hips bother him a great deal and he has trouble with his heart. He has difficulty with one eye, particularly if he attempts to read at night. After he returned from the hospital he was not able to attend to his work as a rancher because he couldn't do the work. He couldn't haul hay, feed cattle, or do any kind of work around the place. He wasn't able to ride horse-back.

47 While the plaintiff was in the hospital no examinations were made of him by the doctor except his eye and one shoulder. The examination of the collar bone consisted in standing the plaintiff against a wall and pressing against the bone to see if it was solid. While the plaintiff was in the hospital, Dr. Kendall, the railroad physician who was in charge of the plaintiff called his attention to a defect in his heart and asked him if he had ever had anything wrong with his heart before this wreck, and the witness told the doctor that he had never known of any such defect. The Court upon its own motion, struck out the testimony and took it from the consideration of the jury. The witness further testified that his heart has been bad since the accident and that it had never bothered him before. In the course of this testimony the following proceedings were had:

Mr. Thompson: Save an exception.

The Court: Yes; you may have exceptions to all adverse rulings, either side.

Mr. Thompson: Both with respect to the testimony which has gone before and that which is to follow?

The Court: Yes.

Thereupon the witness, upon cross-examination, testified as follows:

Examination.

By Mr. Thompson:

Q. I take it, Mr. Gooch, with respect to your heart, you would be willing to submit to an examination by the company's surgeon, would you not?

A. Yes, sir.

48 Mr. Peterson: We are willing to submit to an examination at the hands of anybody.

Mr. Thompson: So far as your——

Mr. Peterson: Although I think I should say at this point, Your Honor, that I do not believe that the question is proper that we are

compelled to submit to an examination. We have no objection to it, but to submit to an examination at the hands of the Company's physician,—I think the question is an improper one.

Mr. Thompson: What do you do then? Do you decline?

Mr. Peterson: I do not. I submit Mr. Gooch to the examination of any fair physician in the world.

Mr. Thompson: Well, will you submit him to the inspection of the Company physician?

Mr. Peterson: I have no knowledge as to who the Company's physician is nor what his obligations may be.

Mr. Thompson: I take it that that isn't necessary. We offer to produce a physician to examine him. Do you consent that he shall examine?

Mr. Peterson: Yes, sir, we submit to his examination at the hands of anyone."

At the time of the initiation of the personal and stock movement of Gooch, he signed a contract of which the original was introduced as Defendant's Exhibit No. 1, and which shall be included as a part of the record on writ of error. After being properly identified, and it having been admitted that the plaintiff signed the
49 same and subscribed his name on the back thereof following the words, "Release of Man or Men in charge," and the printed words following, the following proceedings were had:

"Mr. Thompson: We offer the exhibit in evidence as a part of the cross-examination.

The Court: I will permit this to go in as a part of the cross-examination only upon the assumption that this defense may be gone into by the plaintiff.

Mr. Thompson: Of course.

The Court: I think I ruled a while ago that the offer to show that someone saw him at the hospital was premature.

Mr. Thompson: But of course I waived that.

The Court: Very well.

Mr. Peterson: No objection.

The Court: You will understand, Mr. Peterson, that you may now go into that matter with him, if it is competent for any purpose. In other words, the objection that it is premature is withdrawn."

It was ten days after he reached the hospital before he bathed. Following the day of his arrival at the hospital and prior to the time he took a bath, the witness complained of his back hurting; and so told the doctor, but no attention was given to it until about a week had passed when the nurse, at the doctor's orders rubbed it with
50 alcohol. Thereupon, the witness being under cross-examination by Mr. Thompson, the following proceedings were had:

"Q. You were free to get another physician if you wished, were you not?

A. No.

Q. Why do you say you were not?

A. Because they never offered to give me any other physician.

Q. Did you ever ask?

A. No, I did not."

Dr. Kendall made no examination of the plaintiff prior to his leaving the hospital just before Christmas, except the examination of his eye and collar bone, and it was during this examination of his collar bone when Dr. Kendall called his attention to the defect in his heart. After the plaintiff left the hospital, just prior to Christmas, he made two trips back to the hospital, and the first time the bandage on his arm and shoulder was changed.

Prior to the accident the plaintiff was a farmer owning about 1,100 acres of land, 60 head of cattle and 60 head of sheep although the summer before the accident he had more than that amount of both sheep and cattle. At the time of the trial he had six children ranging in age from three to fifteen years, and was living in Brigham City where there is a school which corresponds to a High School. Prior to the accident the plaintiff lived about ten miles from Bancroft and a mile and a half from the nearest school. The witness drove an automobile, and during the summer of 1918, made two

51 trips from Brigham City to Bancroft and return in it. In August, 1918, he raced a horse, weighing about 900 pounds, with an Indian, the race being for about a hundred yards. Thereupon, being cross-examined by Mr. Thompson, the following question was asked and the following answer given:

"Q. And while you were racing with him you looked under your arm and fell, didn't you?

A. I did."

The witness fell, striking on his shoulder, and a stiff neck was one of the results. Prior to the race the plaintiff had noticed trouble with his heart.

When the plaintiff was about seventeen years old he was shot in the left arm and shoulder with a shot gun, twelve gauge, and was confined to his bed for seven weeks as a result thereof. The left arm is not quite so well developed as the right arm.

The plaintiff moved to Brigham City about August 1st, 1918. After he got there he built himself a small garage about 12 by 16 feet. He bought his home in Brigham City.

The morning of the accident the first doctor arrived in the caboose which came along just prior to No. 5, the passenger train on which the plaintiff was carried to Kemmerer. As soon as this doctor arrived the plaintiff complained to him that he was freezing. The Company doctor arrived on the train and attended the plaintiff in the baggage car on the trip to Kemmerer. The only attention he gave the plaintiff, however, was to stand over him and once

52 in a while roll the plaintiff's eyes back. The plaintiff complained to the doctor that he was cold. The doctor did not bandage his eye then, and in fact did not bandage anything until the following day in the hospital at Kemmerer.

The plaintiff understood that Dr. Kendall was to treat him for the

railroad company, although he did not learn it until the day after the treatment began. During the past summer (1918) the witness went swimming in the natural hot water pool at Lava Hot Springs, Idaho, twice. He stayed in about a half an hour each time, and swam short distances while he was in. The water was at a temperature of about seventy degrees.

On re-direct examination, the witness explained the matter of the horse race with the Indian and his falling off as follows:

"This Indian and I at previous times had had two or three races, him having a certain horse and me one, and that Sunday afternoon he was there, and he bantered me for a race, and I simply told him that his horse couldn't outrun mine, nor never could, and so he wanted to run me, and so I got the horse and got on him barebacked, and went down across the meadow perhaps a hundred yards, and started to run. During the race, I don't know just what happened, but anyway it seems as though everything kind of turned dark in front of my face, and I started to slide off. I kind of caught the

53 horse with my left hand on his withers as I slipped down to the ground, and I slipped down to the ground kind of on my right shoulder and on my neck on to the grass, and I lay there for a second and got up." The horse was running in a straight line at the time. "It was not a race horse but just an ordinary saddle horse.

The witness explained that he had help in putting up his garage in Brigham City, that it took him about six or seven weeks to complete it. The wound which he had received in his left shoulder when seventeen years old, from the gunshot, did not impair his health and the only effect he could notice from it was when he attempted to lift something over his shoulder. The fall from his horse during the race with the Indian did not hurt him seriously and he was not laid up at all. During the round-up in the fall of 1918, the plaintiff did very little riding, taking only short trips. The plaintiff then further identified the tobacco can which had been in his hip pocket at the time of the collision, and the same, without objection was introduced in evidence as Plaintiff's Exhibit 1.

Thereupon the following proceedings were had:

Mr. Peterson examining the witness GOOCH on redirect examination.

"Q. Now, at the time you were at the hospital, Mr. Gooch, did you see Mr. Rasmussen?

A. Yes, sir.

Q. Who is Mr. Rasmussen? If you know?

A. I think he is claim adjustor of the Oregon Short Line Railroad Company?

Q. When was it, Mr. Gooch, that you first saw Mr. Rasmussen there at the hospital?

54 Mr. Thompson: I take it that under the Court's ruling this evidence will be received, and I may have an objection and exception to all of it?

The Court: Yes. Answer the question. When did you see Mr. Rasmussen?

A. I think it was about five days after I were in the hospital.

Mr. Peterson:

Q. Did you have a conversation with Mr. Rasmussen at that time.

A. Yes, sir.

Q. What was the substance of the conversation?

A. He came to my room and asked me if I was ready for a settlement with the company for the injuries I had received.

Q. Yes?

A. I told him I wasn't in a condition to talk with him, that I wasn't ready for a settlement.

Q. Where were you at the time that Mr. Rasmussen had this conversation with you?

A. I was in the ward in the hospital, in bed.

Q. In bed?

A. Yes, sir.

Q. Did you see Mr. Rasmussen again in regard to the matter?

A. Yes, sir.

Q. And where were you at that time?

A. I were in the hospital.

Q. Still in bed?

A. No, sir, I was sitting up in a wheel chair at the time.

55 Q. State what conversation occurred between you and Mr. Rasmussen at that time.

A. He simply—similar to the first one. He asked me if I was ready for a settlement with the Company, and I said "No," in the condition I am in I don't know really how bad I am injured. I would rather wait a while until I get out of the hospital before I make any settlement with him."

On re-cross examination of the witness by Mr. Thompson the witness testified that he did not remember any talk with Mr. Willey concerning his fall from the horse during the race with the Indian.

The second time the witness saw Mr. Rasmussen at the hospital was about ten days after he saw him the first time, and the first time was within four or five days of the time he was taken to the hospital. When he left the hospital, just before Christmas, the doctor took him to the station in his automobile. He had no conversation with Mr. Rasmussen as to whether he had presented any written claims to the Company.

The witness was not stripped by Dr. Hawk and Dr. Kendall on the day he arrived at the hospital, and the next day he was stripped in bed, but did not stand up, but sat up in bed. The nurses bathed his hands and legs a little prior to the time that he had his bath.

On re-direct examination by Mr. Peterson the witness testified that

56 Mr. Rasmussen did not say anything to him in respect to the necessity of his presenting a claim in writing to the General Manager of the Oregon Short Line Railroad Company within thirty days.

Dr. H. Smith Wooley, produced as a witness on behalf of the plaintiff, being first duly sworn, upon direct examination testified that he is a practicing physician, living in Pocatello, Idaho, and that he has been practicing medicine since 1909. He has examined the plaintiff on two different occasions. The plaintiff came to his office first on January 4th, 1918, complaining of soreness in his body generally and a pain around the region of the heart. The doctor made a fluoroscopic examination and found some bruises on the body and a dilated heart. He examined him again on the 9th of March, 1919, and found a pulsating tumor in the sub-clavicle region on the left side, known as an aneurysm. The plaintiff's heart, while enlarged some, still had a murmur. The doctor also noticed a soreness in the sacro region of the back. The principal causes on aneurysm are syphilis, trauma, that is injuries, sudden frights, and any extraordinary condition that is liable to bring added exertion to the heart. Such an experience as the plaintiff had in the wreck of November 24th, 1917, would have a tendency to cause enlargement of the heart. A man following the business of ranching would be working under difficulties if he had enlargement of the heart, and it would cause him more trouble than a man leading a sedentary life.

57 Upon cross-examination by Mr. Thompson the witness testified that he had never examined the plaintiff prior to January 4th, 1918, and could not tell how long the condition of the heart to which he had referred in his direct testimony had existed. There are cases where people have enlargement of the heart and do not know it. An aneurysm could be caused by a gun shot wound. On January 4th, 1918, the doctor noticed no aneurysm on Mr. Gooch.

Upon re-direct examination by Mr. Peterson, the witness was asked if such an experience as Mr. Gooch had in the wreck of November 24th, 1917, would cause an aneurysm and thereupon the following proceedings were had:

"Mr. Thompson: I object to that upon the ground that it is incompetent, irrelevant and immaterial and not in issue.

Mr. Peterson: Counsel has gone into the question of whether an aneurysm might be caused by a gunshot wound, and I think I have a right then to show that it might be caused from other things.

The Court: The objection is overruled.

The doctor stated that it could have been so caused.

Mr. Thompson thereupon moved to strike out all testimony both cross-examination and direct, regarding an aneurysm, and the Court allowed the motion upon the ground that no aneurysm was pleaded. The doctor testified that enlargement of the heart is always dangerous.

Upon recross-examination by Mr. Thompson the witness testified that many people live to a ripe old age with enlargement of the

heart. The doctor could not state whether the plaintiff had
58 enlargement of the heart prior to January 4th, 1918.

John Gooch, the plaintiff, theretofore sworn as a witness in his own behalf, was recalled and upon direct examination testified that he was unable to do anything along the line of his training, viz., farming and stock raising at that time, other than oversee work and that he had no vocation at that time.

Upon recross-examination he testified that since the wreck he had sold 1,024 acres of his land, sixty head of cattle and all his sheep. His memory was not so good as before the wreck and he was not in as good condition to do the supervisory work of managing a farm as he had been before the accident. It was possible that he might have forgotten some of the details of his experiences in the Kemmerer hospital.

The plaintiff and defendant thereupon stipulated, subject to the defendant's objection that it was incompetent, irrelevant and immaterial, and that no proper foundation had been laid, that according to the American table of mortality the expectancy of a man at forty years of age would be 28.18 years.

Upon re-direct examination Mr. Gooch testified that the tobacco can, Plaintiff's Exhibit 1, was in his right hand hip pocket just prior to the wreck, about half full of tobacco, with a lid on, and that it was in the usual shape of such boxes of tobacco, kind of rounding on one side and flat and dented in on the other side.

59 Upon recross-examination Mr. Gooch testified that when in the hospital at Kemmerer he shared his room with a man named McFarland for about two weeks.

Upon redirect examination Mr. Gooch testified that he had never been bothered with his heart prior to the wreck.

Upon recross-examination Mr. Gooch testified that he had never submitted himself to a physician for examination prior to November 24th, 1917.

Thereupon the jury were excused from the room under proper instructions from the Court, the plaintiff having rested his case, and the following proceedings were had:

Mr. Thompson: I move the Court for an order of non-suit and dismissing the action, upon the ground that it appears from the pleadings and the evidence, defendant's exhibit 1, that at the time of the injury sustained by the plaintiff he was riding upon a contract of transportation which provided that the carrier shall not be liable for any accident or injury to him caused by negligence on either the going or return trip, or while on or around the tracks or premises, unless the undersigned or his heirs or personal representatives shall, within thirty days after the accident or injury, give notice in writing of his or her claim therefor to the General Manager of the carrier on whose lines it occurred, and unless such notice is given no claim for personal injury, death or loss of baggage, shall be valid or enforceable, and the plaintiff has failed, following the introduction of the contract, to show such notice was given, but
60 on the contrary has expressly admitted that no such written notice was given at all."

After argument by the respective counsel the following proceedings were had:

The Court: I am very much in doubt as to whether or not the case should go to the jury, by reason of the fact that you haven't shown the physical or mental incapacity to give this notice. That was your suggestion yesterday, that that might be shown. I will have to hold that as a matter of law your evidence is not sufficient for that purpose. So far as appears by the evidence, your client was both physically and mentally able to comply with the provisions of this contract. If I can submit this to the jury at all, it must be by reason of the fact, if it be a fact, by reason of his testimony,—I will put it that way,—to the effect that he did not give notice or make the claim, or was unwilling to make settlement, because within thirty days, or up to the time the thirty days expired, the extent of his injuries was not sufficiently known to enable him to make an intelligent claim. That consideration has been running through my mind as being a possible ground for letting this case go to the jury. I am not at all clear that it is sufficient ground. And the other is, the point which you have just discussed, and that is to whether or not the notice as required by the contract must be given even though

61 the railroad company may already have knowledge, may already have the knowledge that the law or the contract contemplates the written notice shall give it. These decisions to which Mr. Thompson has called my attention, at least in some expressions, would seem to indicate that the notice must be given under any and all circumstances, and that is his contention. I would like to have such authorities as you have upon those two phases or those two considerations. It is necessary to give the notice where the railroad company already has the knowledge which the notice is intended to give, and, second, does the fact that the injured party cannot fully advise the railroad company of the extent of his injuries, does that operate to extend the time for giving the notice, or does it operate to nullify the agreement in that respect? I think you have cited nothing upon this latter proposition.

Mr. Peterson: If Your Honor would give me a short period in which to get my authorities in respect to that—

The Court: Well, these considerations are controlling perhaps of the question of whether or not the case should go to the jury, and I would like to be advised upon it."

Thereupon an adjournment was had until the morning of the following day when the following proceedings were had:

"Mr. Peterson: I have other evidence that I would like to produce, if the Court feels that he should take the case from the jury.

62 The Court: Perhaps you had better state the nature of the evidence. You are appealing now, I assume, to my discretion to re-open the case, even though you have rested, and permit you to offer further evidence?

Mr. Peterson: Yes.

The Court: If so, you had better state in rather definite form the character of the evidence that you have.

Mr. Peterson: I will be able to show, if permitted by the Court, by Mr. Michael Whitworth and by Mr. Kelley, and possibly by other witnesses, that shortly prior to the time that Mr. Gooch was taken to the hospital, that Mr. Rasmussen, the claim agent of the Oregon Short Line Railroad Company, presented himself there, and made offers of settlement with Mr. Gooch, and admitted the liability of the railroad company for the injuries sustained by Mr. Gooch; that the negotiations between Mr. Gooch and this agent of the railroad company were not terminated or brought to a close at that time, but that Mr. Gooch was encouraged to, and through the advice, and through the conversations had with such agent of the railroad company, he was led to believe that the railroad company were ready to negotiate with him and to pay him a fair amount for the damage he had sustained. That Mr. Gooch did not at that time terminate his negotiations with the railroad company, that those negotiations were continued up until and beyond the thirty day period.

And by Mr. Whitworth I shall be able, if permitted by the
63 Court, to show that at a time subsequent to the expiration of the thirty day period, that Mr. Rasmussen and other claim agents of the Oregon Short Line Railroad Company made offers—

The Court: I believe, gentlemen, that I shall permit you to offer this testimony. I really think that it is the better way,—I mean to produce the testimony—the better way to make up this record.” After argument to the Court by Mr. Thompson the Court continued:

“I think, gentlemen, that I shall adhere to the suggestion made a moment ago of entertaining this offer, and, if necessary, the final hearing of this case will have to be continued until Mr. Rasmussen can come. I have certain views of the law, and it may be or it may not be that this evidence will affect the final result, but it is such a question that I would prefer myself that the record be made up in such a way that if either side appeals to a higher court the precise facts may be before that court. It is true I am simply exercising discretion. Counsel for the plaintiff was given every opportunity to put in this evidence which he now offers, and did not do so at the time, and clearly the plaintiff has no right to ask that the case be opened up, but of course, we are sitting here to see that justice and only justice is done, and so long as the case may be opened up without prejudice to the defendant I see no reason why I should not exercise that discretion. I say if Mr. Rasmussen’s presence is required, he will be given ample opportunity to get here.

64 Mr. Thompson: Permit me to say this further before the Court shall finally rule,—and I will be sworn or put in an affidavit, unless the Court shall say that the statement is quite acceptable—

The Court: That will be unnecessary.

Mr. Thompson: That there is a witness who is important that we proposed to bring here. He is the witness McFarland, one of the drover passengers who was injured. He lived at Emmett, Idaho, and he went over to Oregon to work in the ship yards. He was in the hospital with Mr. Gooch. He was a person against whose testimony there certainly was no bar or privileges of any sort whatever,

and we proposed, if necessary and did propose at all times provided we could locate him and get him here in time, to produce him for the purpose of testifying that Mr. Gooch, that his injuries, so far as observable to him, consisted of merely a discolored eye, a discoloration of the skin around that eye, and an inability to get about freely for the first ten days. That from then on he alternately sat in a wheel chair and walked about for another ten days, and that thereafter he was apparently as free to walk about and move about as before, and apparently at the time he left the hospital he had entirely recovered from his injuries, and was as good, so far as a layman could observe, as a man who had gone through no injuries, except

65 that his collar bone, that his arm was bandaged, and, of course, during the time he was in the hospital, before his collar bone was firmly bandaged. We proceeded to endeavor to trace Mr. McFarland. Our first telegram was that he had returned to Emmett, Idaho. We endeavored to locate him at Emmett, Idaho——

The Court: What is the purpose of this, Mr. Thompson?

Mr. Thompson: The purpose is this, that when it became apparent to me that the plaintiff was going to terminate his case in such a manner that the only question would be whether the written notice was necessary under the evidence that he chose to present, I abandoned the notion of getting Mr. McFarland, although I had located him at last over in Oregon, and I have not Mr. McFarland here. Now, I assume that I may be able to get Mr. McFarland in the course of time now, and if the case is re-opened I shall have to ask the indulgence of the Court to get him, over in Oregon, at the place where I was last advised he was, and would have had him except that the case was about to terminate in the manner that it had been before the Court up to this morning.

The Court: Well, of course, you couldn't know that the case would take this turn until yesterday. Now, if in any way you are prejudiced by re-opening the case, the Court will see that you are protected. I will hear you later upon that matter. At present I cannot see how you could have had the witness here and have been kept

66 from bringing him here by reason of re-opening the case, because if counsel had gone on with his testimony yesterday, before closing it, the case would have terminated at this time, rather than now re-opened.

Mr. Thompson: That is true, and yet I have told our men not to attempt to get Mr. McFarland here. Even yesterday evening I could have telegraphed and got Mr. McFarland started, and I felt that under any circumstances of the case, for my protection with reference to Mr. McFarland, that I should make a statement concerning him to the Court, before his testimony is received or entertained.

The Court: Very well. The jurors may come forward."

Thereupon the jurors entered the jury box and the Court continued:

"Mr. Peterson, I will not permit you to recall Mr. Gooch as to any matter within the thirty-day period. You had full opportunity to examine him yesterday, and probably did cover that ground. At least I am not inclined, after the argument, to permit you to recall him in order to strengthen anything he may have testified about. If you want to make an offer as to what occurred after the thirty-day period, you may make that offer with him, but I will not permit you to examine him as to any matter within that thirty-day period, as you went into that yesterday."

Thereupon Michael Whitworth, theretofore called and sworn as a witness for the plaintiff was recalled by the plaintiff, and, 67 upon direct examination testified that some time in the latter part of December, 1917, or early in January, 1918, he came down on the train from Bancroft with Mr. Gooch and Mr. Rasmussen and Mr. Rasmussen was endeavoring to make a settlement with him (Whitworth). In the first part of January, 1918, in Mr. Rasmussen's office in Pocatello, Idaho, Mr. Gooch, Mr. Rasmussen and the witness being present, Mr. Rasmussen tried to get Mr. Gooch to settle his claim with the railroad. In the words of the witness:

"Mr. Rasmussen made him an offer, and they couldn't get together on the offer that was made, and exchanged words back and forth. I don't remember just the exact words that was used. It would be hard for me to recall. I wouldn't want to quote the words, because I don't remember the exact words, but that was the substance of the conversation, that Mr. Rasmussen offered a settlement, and they couldn't get together on the terms of the settlement."

Upon cross-examination the witness stated that when he made settlement with Mr. Rasmussen, Mr. Rasmussen called his attention to the fact that he had made no written claim within thirty days, and that that fact would have been against him had he gone to Court with the claim.

Upon re-direct examination the witness stated that settlement with him was made after the thirty-day period after the wreck had elapsed.

Thereupon J. H. Peterson asked to be sworn as a witness in behalf of the plaintiff, and after being duly sworn testified that he 68 was employed by the plaintiff, Gooch, early in January, 1918, to prosecute his claim against the Oregon Short Line Railroad Company, and thereafter had numerous negotiations with Mr. Rasmussen in respect to the settlement of the claim, in which offers of settlement were made and refused.

Upon cross-examination Mr. Peterson testified that Mr. Rasmussen first approached him in respect to a settlement and that they probably met three or four times in regard to it. Mr. Peterson stated that as near as he could remember the complaint was filed in the case in the summer of 1918. The office copy of the complaint showed that it was filed on March 19, 1918. Thereupon the plaintiff rested his case and the following proceedings were had:

"Mr. Thompson: The defendant renews its motion of last evening, which was argued to the Court and submitted, and upon the same grounds submits that the motion should be granted.

The Court: Gentlemen, I have given to this matter as earnest and careful consideration as the time would permit, and, reluctant though I may be to take the case away from the jury, I feel impelled to do so. The contract which the plaintiff entered into very plainly required that he give notice within thirty days after his injury of claim for damages. Now, as I have already stated to counsel, it is clear in my

69 mind that so far as physical and mental capacity were concerned, the plaintiff was able to comply with his contract in this respect. If he had not been able to do so, I would be inclined to take a different view. I think, further, that he could have complied with the requirements in so far as his knowledge of the extent of his injuries was concerned within that time. The provision does not specify any particular form of notice, nor, in my judgment does it under all circumstances require that the claimant state the precise amount of his claim. If in this particular case Mr. Gooch had said to the Manager of the Railroad Company, 'I was injured in the wreck that occurred at Donovan on a certain day,' describing the incident with sufficient certainty to identify the accident, and had stated that he had received personal injuries, the full extent of which was not at that time known, and that he would claim compensation from the company for all damages that he had suffered, that he would have fully complied with the requirements of this provision, and of course that he might have done. Now, the only defense to the claim of the defendant here, that the plaintiff is barred by reason of his admitted failure to give the notice in writing as required by the provision, is that the railroad company had knowledge of the very facts that it was contemplated the notice would give and that presents to me a very serious question, and it is possible that I am in error in the view that I have taken of the effect of the controlling authorities. I think it is admitted by both sides that no

70 court has passed upon this precise question, when it has arisen under what is called the Carmack Amendment, which, in my judgment is controlling here. Counsel for the defendant has called my attention to certain language in what is called the Milling Company case, by which the Supreme Court of the United States seems to hold that a notice in writing is necessary. In that case the claimant simply sent a telegram. There were some other communications, verbal and otherwise, and the court says that the stipulation required that the claim should be in writing, but a telegram which in itself, or taken with other telegrams, contained an adequate statement, must be deemed to satisfy this requirement. The court there seems to assume that it was necessary to bring home to the railroad company knowledge in writing, and simply held that a telegram would satisfy the demands of the contract in that respect. The case most nearly in point upon the precise question, that I have been able to find, is that of the St. Louis, Iron Mountain & Southern Railway Company vs. Starbird, reported in the 243 United States. That

is a case in which the claimant shipped certain cars of peaches from St. Louis, I think, to New York. When they arrived at New York they were in a damaged condition, owing, as was claimed, to faulty refrigeration. The shipper had signed a contract with the initial carrier, the Iron Mountain Railroad, had signed a contract by which
71 he agreed to notify the railroad company in writing within thirty-six hours after the shipment was received at its destination of the damaged condition of the shipment, if any claim was to be made. This the shipper failed to do. Now the court says, in one place:

"This record presented a suit which showed that it was necessarily brought under rights conferred by the Federal Act; the defendants specifically pleaded the failure to keep the obligation of the contract whose force was binding by virtue of such Act; and the state court, in stating in its decision that this bill of lading had been issued, and would be controlling in the absence of special facts which it found as to the effect of verbal notice given to certain agents of the Pennsylvania Company, in New York, necessarily denied the contention of Federal right made by the defendant that the provision of the bill of lading was conclusive of the rights of the parties in this case and required written notice within thirty-six hours after notice to the consignee of the delivery of the goods."

The provision of the contract was as follows:

"Claims for damages must be reported by consignee in writing to the delivering line within thirty-six hours after the consignee has been notified of the arrival of the freight at the place of delivery."

The court goes on to say that of the cars received there was a report to the dock-master of the Pennsylvania Railroad, the ultimate carrier, a report to the dock-master of the condition of five cars of the shipment. The dock-master was an agent and representative
72 of the carrier. As to the other cars there was no knowledge except that on the part of the longshoremen working on the dock. And the trial court took the case away from the jury as to all but five cars, but submitted the case to the jury upon this theory, as stated by the Supreme Court:

"The state Court held that the stipulation, in view of the perishable character of these shipments, was a reasonable one, but as there was proof in the case to show the knowledge of the Superintendent of the dock of the Pennsylvania Company, where delivery was made, as to five cars of peaches, that as to such cars the necessity of notice was dispensed with, notwithstanding the requirements of the bill of lading."

Now, that is, I think, the nearest of any case we have to the precise situation here. There is no contention here that the General Manager, to whom this written notice should have gone, as required by this bill of lading, that the General Manager of the Oregon Short

Line had actual knowledge, but there is evidence tending to show, and I am assuming that the evidence conclusively shows, that the railroad company, through its medical department, through its claim agent, and through its operating department, had knowledge of this accident and of the injury to Mr. Gooch. So in the case here, the Iron Mountain Company case, the Pennsylvania Railroad Company, the ultimate carrier, had knowledge, through its dock-masters, its representatives, of the damaged condition of the property, and that a claim would be made because of such damage.

73 The Court says:

"The requirements that notice in writing of a claim for damages shall be given in such cases to the delivering carrier, who is the agent of the initial carrier for the purpose of completing the shipment, is but reasonable. It is not difficult for the consignee to comply with a requirement of this kind, and give notice in writing to the agent of the delivering carrier. Such notice puts in permanent form the evidence of an intention to claim damages, and will serve to call the attention of the carrier to the condition of the freight, and enable it to make such investigation as the facts of the case require, while there is opportunity to do so.

"It is true that the record contains testimony tending to show that it would take more than thirty-six hours to separate the good peaches from the bad—I think the testimony was that it would take four days to determine just what the damages to the peaches was—it would take more than thirty-six hours to separate the good peaches from the bad, and to recrate and sell the good ones. But the bill of lading in this case only requires that 'claims for damages must be reported by the consignee, in writing, to the delivering line,' within the time named. The bill of lading contained no stipulation requiring a specific claim to be filed within thirty-six hours fixing the amount of damages to be claimed. It was entirely consistent with this requirement, on discovery of the bad condition of the peaches, to have given notice within the time stipulated of the intention to make a claim for damages, although the exact amount of the claim might not have been ascertained. This would have given an opportunity for the delivering carrier to make the examination which it was the principal purpose of the stipulation to afford."

74 Finally the Court said:

"We find nothing unreasonable in the stipulation concerning notice, and there was not attempt made to comply with it. We therefore think the Supreme Court of Arkansas erred in holding that verbal notice to the dock-master of the condition of the peaches was a compliance with the terms of the contract."

Now, I think it is true, gentlemen, that this case, while so nearly approaching the case we have, is not precisely in point. Here the plaintiff depends upon actual notice. In the other case, the Iron

Mountain Company case, there was a verbal notice to a responsible agent of the delivering carrier. I am, however, unable to make any substantial distinction between the two cases in that respect.

Upon considering the effect of permitting this case to go to the jury, while in a sense it is a hard case, the plaintiff is merely entitled to compensation for whatever his loss or damage may have been, that is, he would be clearly entitled to compensation but for this provision in the contract, and, as I have already suggested, I am very reluctant to deny him the right of submitting this case to the jury.—I have considered it, I may say, somewhat sympathetically, with the view of letting it go to the jury, but while in this particular case it is difficult to see how any injury could be done to the railroad company, with the knowledge it had, and with these

75 negotiations for a settlement, still, if I accept the view urged here by the plaintiff, that actual knowledge supplants or does away with the need for the notice required by the provision of the bill of lading, there is, of course, no place to draw the line. It wouldn't have been necessary for Mr. Gooch to have entered into negotiation at all with the claim agent, because if the actual knowl- of the railroad company was equivalent to the written notice, if written notice was given, Mr. Gooch might have waited, not two or three or four months, but he might have waited nearly three years. He might not have indicated to the railroad company that he ever intended to make a claim. He might have taken a contrary attitude. He might have given the railroad company the impression that he intended to assert no claim, and have waited practically three years, and then commenced a suit. I see no escape from that conclusion, if we adopt the view that actual notice is equivalent, actual knowledge, is equivalent to this written notice, and hence to let this case go to the jury would be to say that in all cases where the railroad company, through some of its subordinate agencies, has actual notice of an accident and of an injury, that the claimant need not present a written notice advising the company that he is going to assert a claim. He remain quiet for two or nearly three years and then assert his claim, and necessarily the company would be prejudiced, because it couldn't take the same precautions in preserving the record, the evidence, that it would if it was actually advised in this formal way that the injured

76 party was going to assert a right.

The motion will be allowed. Gentlemen, you are dismissed from the further consideration of this cause.

Mr. Peterson: Note our exception.

The Court: Yes."

The plaintiff excepted and now excepts to the action of the court in allowing the defendant's motion for a non-suit, in discharging the jury and in entering a judgment in favor of the defendant.

Plaintiff thereupon requested an extension of time until the 15th day of June, 1919, in which to prepare, serve and file his bill of

exceptions, and the Court, upon the 18th day of March, 1919, duly made and entered its order granting such extension of time.

J. H. PETERSON,

T. C. COFFIN,

Attorneys for Plaintiff,

Residence, Pocatello, Idaho.

(Title of Court and Cause.)

No. 210.

Order Settling and Approving Bill of Exceptions.

The plaintiff, through his attorneys, J. H. Peterson, Esq., and T. C. Coffin, Esq., having made application for the settlement and allowance of the Bill of Exceptions hereto attached, and a stipulation having been entered into between the parties hereto and
77 filed in this cause, stipulating that the Bill of Exceptions to which this order is attached embodies all the amendments proposed by the defendants hereto, and said Bill of Exceptions being approved by the Court; and it appearing that said Bill of Exceptions has been presented for settlement within time:

Now, therefore, on motion of J. H. Peterson, Esq., and T. C. Coffin, Esq., the plaintiff's attorneys, it is ordered that said Bill of Exceptions, as the same now stands, and as presented to me, be and it hereby is approved, allowed and settled as the true Bill of Exceptions in this cause, and that the same, as so settled be now and here certified accordingly by the undersigned, the Judge who presided at the trial of this cause, and that said Bill of Exceptions, when so certified, be filed by the Clerk and made a part of the record herein.

June 16th, 1919.

FRANK S. DIETRICH,

United States District Judge Who Tried said Cause.

Endorsed: Filed June 16th, 1919. W. D. McReynolds, Clerk.
Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

No. 210.

Petition for Writ of Error.

To the Honorable Frank S. Dietrich, Judge of the United States District Court aforesaid:

78 Now comes John Gooch, Jr., by his attorneys, J. H. Peterson and T. C. Coffin, and respectfully shows that on the 14th day of March, 1919, the Court entered a final judgment of dismissal against your petitioner, the plaintiff, and in favor of Oregon Short

Line Railroad Company, a corporation, the defendant, in the above-entitled cause;

Your petitioner, feeling himself aggrieved by said judgment of dismissal entered as aforesaid, herewith petitions the Court for an order allowing him to prosecute a writ of error to the Circuit Court of Appeals for the Ninth Circuit under the laws of the United States in such cases made and provided;

Wherefore, in consideration of the premises, your petitioner prays that writ of error do issue to the Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California, in said circuit, for the correction of errors complained of and herewith assigned, and that an order be made fixing the amount of security to be given by the plaintiff in error, conditioned as the law directs, and upon giving such bond as may be required that all further proceedings may be suspended until the determination of said writ of error by the Circuit Court of Appeals.

J. H. PETERSON,

T. C. COFFIN,

*Attorneys for Plaintiff in Error; Residence
and Post Office Address, Pocatello, Idaho.*

79 Service of the foregoing petition for writ of error by receipt of a copy thereof admitted this 23rd day of June, 1919.

GEO. H. SMITH,

H. B. THOMPSON,

Attorneys for Defendant.

Endorsed: Filed June 23, 1919. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 210.

Assignment of Errors.

Now comes John Gooch, Jr., plaintiff, in the above-entitled cause, by his attorneys, J. H. Peterson and T. C. Coffin, and in connection with his petition for a writ of error in this cause assigns the following errors which he, as plaintiff in error, avers occurred at the trial hereof, and upon which he relies to reverse the judgment entered herein as appears of record.

1. The Court erred in deciding as a matter of law that the plaintiff, John Gooch, Jr., was physically and mentally able to give written notice to the manager of the Oregon Short Line Railroad Company, the defendant, within thirty days of the date of the accident and injury complained of, as the determination of such fact was within the province of the jury and not within the province of the Court;

2. The Court erred in holding as a matter of law that the plaintiff, John Gooch, Jr., was bound by that portion of the bill of lading upon which his cattle were shipped entitled "Release of Man or Men in Charge," said motion of such bill of lading or contract being void as a limitation of the liability of a common carrier of passengers for hire;

3. The Court erred in granting and allowing defendant's motion for a non-suit at the conclusion of the testimony of the plaintiff herein;

4. The Court erred in making and entering a judgment of dismissal against the plaintiff, John Gooch, Jr., and in favor of the defendant, Oregon Short Line Railroad Company, for the reason that that portion of the bill of lading or contract of carriage entitled "Release of Man or Men in Charge" was void both as an unreasonable condition, and as a limitation of the liability of a common carrier of passengers for hire for injuries occurring by the negligence of the common carrier or by the negligence of its servants and employees.

Wherefore, the said John Gooch, Jr., plaintiff in error, prays that the judgment of the District Court of the United States for the District of Idaho, Eastern Division, be reversed, and that said Court be directed to grant a new trial in said cause.

J. H. PETERSON,

T. C. COFFIN,

*Attorneys for Plaintiff in Error, Plaintiff in Lower Court;
Residence and Post Office Address, Pocatello, Idaho.*

Service of the foregoing assignment of errors and prayer for reversal by receipt of a copy thereof admitted this 23rd day of June, 1919.

GEO. H. SMITH,
H. B. THOMPSON,
Attorneys for Defendant.

Endorsed: Filed June 23, 1919. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 210.

Order Allowing Writ of Error and Fixing Bond.

Upon motion of J. H. Peterson and T. C. Coffin, attorneys for the plaintiff above-named, and upon filing a petition for a writ of error, and an assignment of errors and prayer for reversal:

It is ordered that a writ of error be, and the same is hereby allowed to have review in the United States Circuit Court of Appeals for the Ninth Circuit, of the judgment heretofore entered in the

above-entitled cause of the 14th day of March, 1919, in favor of the defendant above-named and against the said plaintiff, and that the amount of the bond on appeal be and hereby is fixed at Two Hundred (\$200.00) —.

Done at Chamber in Pocatello, Idaho, this 23rd day of June, 1919.

FRANK S. DIETRICH,

District Judge.

82 Service of the foregoing order and receipt of a copy thereof admitted this 23rd day of June, 1919.

GEO. H. SMITH,

H. B. THOMPSON,

Attorneys for Defendant.

Endorsed: Filed June 23, 1919. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 210.

Bond on Writ of Error.

Know all men by these presents: That we, D. R. Pingree and E. J. Merrill, as sureties, are held and firmly bound unto Oregon Short Line Railroad Company, a corporation, defendant above named, in the sum of Two Hundred (\$200.00) Dollars, to be paid to said Oregon Short Line Railroad Company, a corporation, its successors or assigns, to which payment well and truly to be made we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents:

Sealed with our seals, and dated this 23rd day of June, 1919:

Whereas the above-named John Gooch, Jr., has sued out a Writ of Error to the Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment made and entered in the above-entitled Court and cause on the 14th day of March, 1919;

Now therefore, the condition of this obligation is such that if the above-named John Gooch, Jr., shall prosecute said writ to
83 effect, and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and virtue.

D. R. PINGREE,

Surety.

E. J. MERRILL,

Surety.

STATE OF IDAHO,

County of Bannock, ss:

D. R. Pingree and E. J. Merrill, whose names are subscribed as sureties to the foregoing undertaking, being severally duly sworn, each for himself and not one for the other, deposes and says that he

is a resident and freeholder within the State of Idaho, and that he is worth the sum specified in said undertaking as the penalty thereof, exclusive of property exempt from execution.

D. R. PINGREE.
E. J. MERRILL.

Subscribed and sworn to before me this 23rd day of June, 1919.
[SEAL.]

BRANCH BIRD,
Notary Public, Residence, Pocatello, Idaho.

The foregoing bond is approved this 23rd day of June, 1919.
FRANK S. DIETRICH,
U. S. District Judge.

Endorsed: Filed June 23, 1919. W. D. McReynolds, Clerk.

84 (Title of Court and Cause.)

No. 210.

Writ of Error.

UNITED STATES OF AMERICA, *ss.*

The President of the United States of America to the Judges of the District Court of the United States for the Eastern Division of the District of Idaho, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between John Gooch, Jr., plaintiff, and Oregon Short Line Railroad Company, a corporation, defendant, to the great damage of the said John Gooch, Jr., as by his complaint appears:

We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, at the Court rooms of said Court in the city of San Francisco, California, together with this writ, so that you have the same at the said place, before the Justices aforesaid, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Justices of the said Circuit Court of Appeals may cause further to be done therein, to correct that
85 error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 23rd day of June, 1919, in the year of our Lord One Thousand Nine Hundred Nineteen, and of

the Independence of the United States the one hundred and forty-third.

[SEAL.]

W. D. McREYNOLDS,

*Clerk of the United States District Court for
the District of Idaho.*

The foregoing writ is hereby allowed:

FRANK S. DIETRICH,

District Judge.

Service of the foregoing Writ of Error and receipt of a copy thereof admitted this 23rd day of June, 1919.

GEO. H. SMITH,

H. B. THOMPSON,

Attorneys for Defendant.

Endorsed: Filed June 23, 1919. W. D. McReynolds, Clerk.

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(Title of Court and Cause.)

No. 210.

Citation on Writ of Error.

The President of the United States to Oregon Short Line Railroad Company, a Corporation, and to Geo. H. Smith and H. B. Thompson, its Attorneys, Greetings:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco, State of California, within thirty days from the date of this writ, pursuant to a Writ of Error filed in the Clerk's office of the District Court of the United States for the District of Idaho, Eastern Division, wherein John Gooch, Jr., is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Frank S. Dietrich, District Judge, this 23rd day of June, 1919.

FRANK S. DIETRICH,

United States District Judge.

Attest:

[SEAL.] W. D. McREYNOLDS,

Clerk.

87 Service of the within Citation on Writ of Error admitted
and receipt of a copy thereof admitted this 23rd day of June,
1919. GEO. H. SMITH,
H. B. THOMPSON,

Attorneys for Defendant.

Endorsed: Filed June 23, 1919. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 210.

Stipulation for Record on Return to Writ of Error.

It is hereby stipulated and agreed by and between the respective parties to the above-entitled cause, through their attorneys of record, that the following portions only of the record in said cause shall be certified by the Clerk of the above-entitled Court to the Circuit Court of Appeals for the Ninth Circuit in response to the Writ of Error herein to-wit:

1. Complaint.
2. Answer.
3. Judgment.
4. Notice of Motion for New Trial.
5. Motion for New Trial.
6. Opinion of Court on Motion for New Trial.
7. Bill of Exceptions.
8. Petition for Writ of Error.
9. Assignment of Errors.
10. Order Allowing Writ of Error.
11. Bond on Writ of Error.

88 12. Citation.

13. Writ of Error.
14. All original exhibits.
15. This Stipulation.

It is further stipulated that this cause was originally filed in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bannock on the 19th day of March, 1918, that the defendant by motion, thereafter removed the same to the District Court of the United States for the District of Idaho, Eastern Division, and that the same was filed in said Court on the 23rd day of April, 1918.

It is further stipulated that the Plaintiff's Proposed Bill of Exceptions were served upon the attorneys for the defendant at Pocatello, Idaho, on the 10th day of May, 1919.

Dated this 23rd day of June, 1919.

J. H. PETERSON,

T. C. COFFIN,

Attorneys for Plaintiff in Error.

GEO. H. SMITH,

H. B. THOMPSON,

JOHN O. MORAN,

Attorneys for Defendant in Error.

To the Hon. W. D. McReynolds, Clerk of the above-entitled Court: In accordance with the Writ of Error in the above-entitled cause you are hereby requested to transmit to the Circuit Court of Appeals those portions of the record in said cause which are specified 89 in the foregoing stipulation together with all original exhibits.

J. H. PETERSON,

T. C. COFFIN,

Attorneys for Plaintiff in Error.

Endorsed: Filed June 23, 1919. W. D. McReynolds, Clerk.

Return to Writ of Error.

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

[SEAL.]

W. D. McREYNOLDS,

Clerk.

(Title of Court and Cause.)

No. 210.

Clerk's Certificate.

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered 1 to 90, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same, together constitute the transcript of the record herein, upon Writ of Error to the United States Circuit 90 Court of Appeals for the Ninth Circuit, as requested by the praecipe filed herein.

I further certify that the cost of the record herein amounts to the sum of \$113.90, and that the same has been paid by the Plaintiff in Error.

Witness my hand and the seal of said court this 21st day of July, 1919.

[SEAL.]

W. D. McREYNOLDS,
Clerk.

[Endorsed:] Printed Transcript of Record. Filed July 25, 1919.
F. D. Monekton, Clerk.

91 & 92

No. 3363.

United States Circuit Court of Appeals for the Ninth Circuit.

JOHN GOOCH, JR., Plaintiff in Error.

vs.

OREGON SHORT LINE RAILROAD COMPANY, a Corporation, Defendant
in Error.

Upon Writ of Error from the United States District Court for the
District of Idaho, Eastern Division.

Proceedings had in the United States Circuit Court of Appeals for the
Ninth Circuit.

53 At a stated term, to wit, the October Term, A. D. 1919, of the
United States Circuit Court of Appeals for the Ninth Circuit,
held in the Courtroom thereof, in the City and County of San Fran-
cisco, in the State of California, on Thursday, the sixteenth day of
October, in the year of our Lord one thousand nine hundred and
nineteen.

Present:

The Honorable William B. Gilbert, Senior Circuit Judge, Pres-
iding;

The Honorable Erskine M. Ross, Circuit Judge;

The Honorable William H. Hunt, Circuit Judge.

No. 3363.

JOHN GOOCH, JR., Plaintiff in Error.

vs.

OREGON SHORT LINE RAILROAD COMPANY, a Corporation, Defendant
in Error.

Order of Submission.

Ordered above-entitled cause argued by Mr. J. H. Peterson, coun-
sel for the plaintiff in error, and by Messrs. H. B. Thompson, and
George H. Smith, counsel for the defendant in error, and submitted
to the Court for consideration and decision.

94 At a stated term, to wit, the October Term, A. D. 1919, of the United States Circuit Court of Appeals for the Ninth Circuit held in the Courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the fifth day of April, in the year of our Lord one thousand nine hundred and twenty.

Present:

The Honorable William W. Morrow, Circuit Judge, Presiding.
The Honorable William H. Hunt, Circuit Judge.

In the Matter of the Filing of Certain Opinions and of the Filing and Recording of Certain Judgments and Decrees.

By direction of the Honorable William B. Gilbert, Erskine M. Ross, and William H. Hunt, Circuit Judges, before whom the cases were heard, Ordered that the typewritten opinion this day rendered by this Court in each of the following entitled causes be forthwith filed by the Clerk, and that a judgment or decree be filed and recorded in the Minutes of this Court in each of the causes in accordance with the opinion filed therein: * * * John Gooch, Jr., Plaintiff in Error, vs. Oregon Short Line Railroad Company, a Corporation, Defendant in Error. No. 3363. * * *

95 In the United States Circuit Court of Appeals, for the Ninth Circuit.

No. 3363.

JOHN GOOCH, JR., Plaintiff in Error,

vs.

OREGON SHORT LINE RAILROAD COMPANY, a Corporation, Defendant in Error.

Opinion U. S. Circuit Court of Appeals.

Upon Writ of Error to the United States District Court for the District of Idaho, Eastern Division.

Before Gilbert, Ross, and Hunt, Circuit Judges.

The plaintiff in error, on November 23, 1917, shipped, in interstate commerce, certain livestock over the railroad line of the defendant in error, accompanying the shipment as care-taker under the usual Drover's Contract, which was made a part of the bill of lading issued to him by the Railroad Company, and which is, in part, as follows:

"In consideration of his (plaintiff's) carriage without charge other than the sum stipulated herein for the carriage of the livestock men-

tioned herein, as a care-taker accompanying said livestock, the undersigned (plaintiff) hereby agrees * * * that the carrier shall not be liable for any accident or injury to him caused by negligence on either the going or return trip or while on or around the railroad tracks or premises, unless the undersigned (plaintiff) or his heirs or personal representatives shall within 30 days after the accident or injury give notice in writing of his claim therefor to the General Manager of the carrier on whose line it occurred, and unless such notice is given no claim for personal injury * * * shall be valid or enforceable."

The day after the beginning of such transportation the freight train carrying the plaintiff and his stock, while lying at a siding called Bonovian, in the state of Wyoming, and while the plaintiff was asleep, the engine of the train, while switching, ran into the caboose, inflicting upon the plaintiff the personal injuries for which the action was brought. The plaintiff was taken to the hospital of the company at Kemmerer, Wyoming, where he remained under the care of the company's physicians for about 30 days, when, although not discharged, he was given leave to go to his home to spend Christmas. About five days after the accident a claim agent of the railroad company called upon the plaintiff at the hospital to discuss a settlement with him, which the plaintiff declined, on the ground that he was in no condition, physically or mentally, to do so. The agent returned for the same purpose about ten days later, and the plaintiff again refused to discuss the matter. Later, and subsequent to the expiration of the 30-day period, similar attempts were made by representatives of the company, which offers of settlement being refused the suit was commenced, and upon the trial of it, and proof of the facts that have been stated, the court below granted a motion made by the defendant for a nonsuit, and dismissed the action at the plaintiff's cost, who sued out the present writ of error.

Rees, Circuit Judge, after stating the case:

The shipment of the stock being interstate was, of course, subject to the provisions of the Act of Congress to Regulate Commerce, pursuant to which the bill of lading was issued, containing the provision regarding the transportation of the plaintiff in error on the same train to see to the proper care of his stock. That such care-taker is still to be regarded as a passenger for hire, notwithstanding the amendments made by Congress to the Act to Regulate Commerce as it existed at the time of the decision of the Supreme Court in the case of *New York C. R. Co. vs. Lockwood*, 17 Wall. 357, is shown by the comparatively recent decision of the same court in the case of *Norfolk Southern R. R. Co. vs. Chatman*, 244 U. S. 276. That the carrier cannot stipulate for its exemption from its common-law liability or for a limitation of such liability is conceded by counsel for the defendant in error, so it is needless to refer to the numerous decisions to that effect that are cited for the plaintiff in error.

What was held by the Court below, and what is here contended in support of that decision, is that the clause of the contract in question providing that the carrier should not be liable to the care-taker for any injury growing out of negligence of the former
98 unless he or his personal representative should within 30 days after injury give notice in writing of his claim therefor to the general manager of the carrier on whose line the injury occurred, was a condition of recovery and not any exemption from or limitation of liability, which condition it was essential for the plaintiff in error to have complied with before being entitled to bring the suit.

In the case of *Georgia, Florida & Alabama Ry. Co. vs. Blish Milling Co.*, 241 U. S. 190, the bill of lading of an interstate shipment issued by the initial carrier contained a stipulation that claims for failure to make delivery must be made in writing to the carrier at point of delivery within a specified period, otherwise the carrier should not be liable. The Supreme Court there adjudged the required notice essential to the bringing of the action for the misdelivery complained of; that the effect of such a stipulation is unaffected by the form of the action, and that the parties to such a contract cannot waive its terms, nor can the carrier by its conduct give the shipper the right to ignore such terms and hold the carrier to a different responsibility than that fixed by the agreement made under the published tariffs and regulations. In the course of its opinion the Court declared:

"Ordinarily the managing officers, and those responsible for the settlement and contest of claims, would be without actual knowledge of the facts of a particular transaction. The purpose of the stipulation is not to escape liability but to facilitate prompt investigation. And to this end, it is a precaution of obvious wisdom, and in no respect repugnant to public policy, that the carrier by its contracts should require reasonable notice of all claims against it even with respect to its own operations."

In the later case of *St. Louis, I. Mount. & So. Ry. Co. vs. Starbird*, 243 U. S. 592, which involved an interstate shipment of peaches, a highly perishable article and in which case the bill of lading stipulated that claims for damages must be reported by the consignee in writing to the delivering line within 36 hours after notice to the consignee of the arrival of the freight at the place of delivery, and that if such notice was not there given neither the initial carrier nor any of the connecting or intermediate carriers should be liable, the Court adjudged the stipulation reasonable and that non-compliance therewith excused the initial carrier from liability.

We perceive no sound reason for making any distinction between the two last-mentioned cases and the present one concerning a precisely similar condition relating to injury to the care-taker of the property constituting the shipment. It is true that in the present case the carrier had actual notice of the injury complained of, and through its agents sought, without success, a settlement of the damages occasioned thereby; but the offer of settlement was refused, and at no time, so far as appears, was the amount of his claim stated, even

verbally, by the plaintiff in error, or by any representative of his. In the case of St. Louis, I. Mount. & So. Ry. Co. vs. Starbird, supra, verbal notice of the damage to the property was given to a dock-master of the delivering carrier, which the Supreme Court held did not satisfy the requirement of the stipulation that the damages should be reported in writing. The similar stipulation involved in Georgia, Florida & Alabama R. Co. vs. Blish Milling Co., supra, requiring a claim to be made in writing, the Court held (241 U. S. 198) to be satisfied by a telegram which in itself, or taken with other documents, contained an adequate statement of the claim. But here there was no statement in any kind of writing of any claim, and not even any verbal statement of the amount of it. The judgment is affirmed.

[Endorsed:] Opinion. Filed April 5, 1920. F. D. Monckton, clerk, by Paul P. O'Brien, deputy clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3363.

JOHN GOOCH, JR., Plaintiff in Error,

vs.

OREGON SHORT LINE RAILROAD COMPANY, a Corporation, Defendant in Error.

Judgment U. S. Circuit Court of Appeals.

In Error to the District Court of the United States for the District of Idaho, Eastern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Idaho, Eastern Division and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the defendant in error and against the plaintiff in error.

It is further ordered and adjudged by this Court that the defendant in error recover against the plaintiff in error for its costs herein expended, and have execution therefor.

[Endorsed:] Judgment. Filed and entered April 5, 1920. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

At a Stated Term, To wit, the October Term, A. D. 1919, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Court-room thereof, in the City and County of San Francisco, in the State of California, on Monday, the Seventeenth Day of May, in the Year of Our Lord One Thousand Nine Hundred and Twenty.

Present: The Honorable William B. Gilbert, Senior Circuit Judge, presiding; the Honorable Erskine M. Ross, Circuit Judge; the Honorable William H. Hunt, Circuit Judge.

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No. 3363.

JOHN GOOCH, JR., Plaintiff in Error,

vs.

OREGON SHORT LINE RAILROAD COMPANY, a Corporation, Defendant
in Error.*Order Denying Petition for Rehearing.*

On consideration thereof, and by direction of the Honorable William B. Gilbert, Erskine M. Ross, and William H. Hunt, Circuit Judges, before whom the cause was heard, it is Ordered that the petition filed May 3, 1920, on behalf of the plaintiff in error for a rehearing of the above-entitled cause be, and hereby is denied.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3363.

JOHN GOOCH, JR., Plaintiff in Error,

vs.

OREGON SHORT LINE RAILROAD COMPANY, a Corporation, Defendant
in Error.*Order Staying Issuance of Mandate Under Rule 32 Until After
Supreme Court U. S. Passes Upon Petition for Writ of Certiorari, etc.*

Upon application of Messrs. Peterson and Coffin, counsel
103 for the plaintiff in error, and good cause therefor appearing,
ordered mandate of this Court under Rule 32 in the above-entitled cause stayed for a period of thirty (30) days from the 21st instant, and provided a petition for writ of certiorari be docketed and submitted to said Supreme Court agreeably to subdivision 4 of Rule 37 of the said Supreme Court, within said thirty days;

It is further ordered that said mandate be further stayed until after the determination of said petition.

WM. B. GILBERT,

Senior United States Circuit Judge.

Dated San Francisco, California, May 17, 1920.

[Endorsed:] Order Staying Issuance of Mandate Under Rule 32,
etc. Filed May 17, 1920. F. D. Monckton, Clerk.

104 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3363.

JOHN GOOCH, JR., Plaintiff in Error,

VS.

OREGON SHORT LINE RAILROAD COMPANY, a Corporation, Defendant
in Error.

*Certificate of Clerk U. S. Circuit Court of Appeals to Record Certified
Under Section 3 of Rule 37 of the Rules of the Supreme Court of
the United States.*

I, Frank D. Monckton, as Clerk of the United States Circuit
Court of Appeals for the Ninth Circuit, do hereby certify the fore-
going one hundred and three (103) pages, numbered from and
including 1 to and including 103, to be a full, true and correct copy
of the entire record of the above-entitled case in the said Circuit
Court of Appeals, made pursuant to request of counsel for the plain-
tiff in error, and certified under section 3 of Rule 37 of the rules
of the Supreme Court of the United States, as the originals thereof
remain on file and appear of record in my office.

105 Attest my hand and the seal of the said the United States
Circuit Court of Appeals for the Ninth Circuit, at the city
of San Francisco, in the State of California, this 26th day of May,
A. D. 1920.

[Seal of United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,

Clerk,

By PAUL P. O'BRIEN,

Deputy Clerk.

106 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the
Judges of the United States Circuit Court of Appeals for the Ninth
Circuit, Greeting:

Being informed that there is now pending before you a suit in
which John Gooch, Jr., is plaintiff in error, and Oregon Short Line
Railroad Company is defendant in error, which suit was removed
into the said Circuit Court of Appeals by virtue of a writ of error to
the District Court of the United States for the District of Idaho,
and we, being willing for certain reasons that the said cause and the
record and proceedings therein should be certified by the said Circuit
Court of Appeals and removed into the Supreme Court of the

107 United States, do hereby command you that you send with-
out delay to the said Supreme Court, as aforesaid, the record

and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the fifteenth day of October, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,

Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 27,769. Supreme Court of the United States, No. 412, October Term, 1920. John Gooch, Jr., vs. Oregon Short Line Railroad Company. Writ of Certiorari. Docketed, No. 3363. United States Circuit Court of Appeals for the Ninth Circuit. Filed Oct. 23, 1920. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

108 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3363.

JOHN GOOCH, JR., Plaintiff in Error,

vs.

OREGON SHORT LINE RAILROAD COMPANY, a Corporation, Defendant in Error.

Stipulation.

It is hereby stipulated between the Plaintiff in Error, John Gooch, Jr., and the Defendant in Error, Oregon Short Line Railroad Company, a corporation, that the Transcript of the Record already filed in the office of the clerk of the Supreme Court of the United States with the petition for writ of certiorari be taken as a return to said writ dated the 15th day of October, 1920.

Dated this 20th day of October, 1920.

(Sgd.)

J. H. PETERSON,

(Sgd.)

T. C. COFFIN,

Attorneys for Plaintiff in Error.

Residence Pocatello, Idaho.

(Sgd.)

GEO. H. SMITH,

(Sgd.)

H. B. THOMPSON,

(Sgd.)

JOHN O. MORAN,

Attorneys for Defendant in Error.

Residence Salt Lake City, Utah and Pocatello, Idaho.

[Endorsed:] Stipulation as to return to writ of certiorari. Filed October 23, 1920. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

109 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3363.

JOHN GOOCH, JR., Plaintiff in Error,

vs.

OREGON SHORT LINE RAILROAD COMPANY, a Corporation, Defendant
in Error.

*Certificate of Clerk U. S. Circuit Court of Appeals to Stipulation as
to Return to Writ of Certiorari from the Supreme Court of the
United States.*

I, Frank D. Monckton, as Clerk of the United States Circuit Court
of Appeals for the Ninth Circuit, do hereby certify the preceding
page to be a full, true and correct copy of a "Stipulation as to Return
to Writ of Certiorari," filed in the above entitled cause on the 23d
day of October, A. D. 1920, as the original thereof remains on file
and of record in my office.

Attest my hand and the seal of the United States Circuit Court of
Appeals for the Ninth Circuit, at the City of San Francisco, in the
State of California, this 23d day of October, A. D. 1920.

[Seal of the United States Circuit Court of Appeals, Ninth
Circuit.]

F. D. MONCKTON,

Clerk,

By PAUL P. O'BRIEN,

Deputy Clerk.

110 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3363.

JOHN GOOCH, JR., Plaintiff in Error,

vs.

OREGON SHORT LINE RAILROAD COMPANY, a Corporation, Defendant
in Error.

Return to Writ of Certiorari.

By direction of the Honorable the Judges of the United States
Circuit Court of Appeals for the Ninth Circuit, I, Frank D. Monckton,
as Clerk of said Court in obedience to the annexed writ of certiorari
issued out of the Honorable the Supreme Court of the United States
and addressed to the Honorable the Judges of the United States Cir-
cuit Court of Appeals for the Ninth Circuit, commanding them to

send, without delay, to the said Supreme Court of the record and proceedings in the above-entitled cause do attach to the said Writ and send to the said Supreme Court a certified copy of a "Stipulation of Counsel Relative to Return to Writ of Certiorari," in which said Stipulation it is provided that the certified Transcript of the Record heretofore filed by the plaintiff in error in said cause in the said Supreme Court as a part of its petition for a Writ of Certiorari may be taken as the Return to the said Writ of Certiorari, the original of which stipulation was filed in my office on this 23d day of October, A. D. 1920.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 23d day of October, A. D. 1920.

[Seal of the United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
*Clerk of the United States Circuit Court
of Appeals for the Ninth Circuit.*
By PAUL P. O'BRIEN,
Deputy Clerk.

111 [Endorsed:] File No. 27,769. Supreme Court U. S.
October Term, 1920. Term No. 412. John Gooch, Jr.,
Petitioner, vs. Oregon Short Line Railroad Company. Writ of
certiorari and return. Filed Oct. 29, 1920.